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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 430 MISC.

In the Matter of the Petition of

LOWELL M. BIRRELL

For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable SIDNEY SUGARMAN, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of said Court.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

PETITION FOR A WRIT OF PROHIBITION AND MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE SIDNEY SUGARMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND TO THE JUDGES AND OFFICERS OF SAID COURT

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For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable SIDNEY SUGARMAN, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of said Court.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

The petitioner moves the Court for leave to file the petition for a writ of prohibition and mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable the United States District Court for the Southern District of New York, and the Honorable Sidney Sugarman, a Judge of the United States District Court for the Southern District of New York, to show cause why a writ of prohibition and mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and proper.

RICHARD H. WELS,
Counsel for Petitioner,
No. 341 Madison Avenue,
New York 17, N. Y.

IN THE

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In the Matter of the Petition of

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For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable SIDNEY SUGARMAN, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of said Court.

PETITION FOR A WRIT OF PROHIBITION AND MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE SIDNEY SUGARMAN, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND TO THE JUDGES AND OFFICERS OF SAID COURT

Petitioner prays that a writ of prohibition issue to the United States District Court for the Southern District of New York, to the Honorable Sidney Sugarman, a Judge of the United States District Court for the Southern District of New York, and to the judges and officers of that Court, staying them from proceeding with contempt proceedings heretofore instituted against petitioner, from executing a warrant for the arrest of petitioner issued on November 20, 1957, "for the reason that he wilfully failed to appear after having been served with a subpoena to

appear at the trial of the case of Securities and Exchange Commission v. Swan-Finch Oil Corporation, et al., on the 7th day of October, 1957, and thereafter having failed to respond personally to an Order to Show Cause duly issued on the 11th day of October, 1957.", and from seeking the withdrawal of passport facilities heretofore accorded to petitioner by the United States Department of State; and that a writ of mandamus issue directing them to vacate the order initiating such contempt proceedings and directing the issuance of such warrant, and to quash the warrant, and for such other and further relief as to the Court may seem just and proper in the premises.

Citations to Opinions Below

There were no opinions below. The order directing the issuance of the warrant for the arrest of petitioner was made orally from the bench by Judge Sugarman on November 20, 1957, and the verbatim record thereof appears in Appendix B, hereto, *infra,* pp. 93-94. The warrant for petitioner's arrest, also issued on November 20, 1957, is printed in Appendix B, hereto, *infra,* p. 126. The order denying petitioner's application to vacate such order of November 20, 1957, and to quash the warrant of arrest was entered on December 2, 1957, and is printed in Appendix B hereto, *infra,* at p. 129.

The decision of the United States Court of Appeals for the Second Circuit (Medina, Lumbard, and Waterman, CJJ) denying petitioner's petition for a writ of prohibition and mandamus was handed down orally from the bench on December 9, 1957, at the time of argument, without the Court having read or examined the brief submitted by petitioner.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651.

Statutes and Rules Involved

The statutory provisions involved are Sections 401 and 402 of Title 18, United States Code; Rule 45(f) of the Federal Rules of Civil Procedure; and Rule 42 of the Federal Rules of Criminal Procedure. They are printed in Appendix A, *infra*, pp. 48-50.

Statement of the Case

The warrant for petitioner's arrest for failure to appear as a witness was issued on November 20, 1957 in connection with a civil action instituted in the United States District Court for the Southern District of New York by the Securities and Exchange Commission on April 15, 1957 (which action terminated for all purposes on *November 18, 1957*), against the petitioner and twenty-three other defendants. The complaint in such action alleged that the defendants had sold shares of the capital common stock of Swan-Finch Oil Corporation without having filed a registration statement with the SEC and further alleged that by reason thereof the defendants had violated the registration provisions of the Securities Act of 1933. The complaint sought an injunction against the continued sale of such securities by the defendants unless and until a registration statement had been filed with the Commission and had become effective, "provided that the foregoing shall not apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act of 1933, as amended".

Simultaneously with the filing of this complaint, the Commission obtained a temporary restraining order, and an order to show cause why a preliminary injunction should not be granted. The order to show cause was returnable before Judge Sugarman in the motion part of the District Court on April 25, 1957.

On the return day of such order to show cause, the petitioner filed an answering affidavit and an answer to the complaint in which he set forth that the only securities sold by the defendants were securities which, under the rules and regulations of the Commission, were in fact exempt from the registration provisions of the Securities Act.

On May 13, 1957 the petitioner and six other defendants filed consents to the entry of final injunctions against them in the exact language of the relief sought by the Commission, and such final injunctions were then duly entered. In filing such consent, petitioner again denied having violated the Securities Act, but pointed out to the District Court that the Commission merely sought to enjoin the defendants from selling without registration securities which were not exempt from registration, that the only securities which had been sold by the consenting defendants were securities which were in fact exempt from the registration requirements, and that the sole effect of the injunction would be to formalize the practices which the defendants had consistently followed.

Although the representatives of the Commission, in their application for a temporary restraining order and for a temporary injunction, indicated that the Commission's case was fully prepared and ready, and that it had available the proofs with which to sustain its charges against these twenty-four defendants, this position quickly shifted. It soon became apparent that the Commission could not sustain its charges unless it could succeed in compelling some of the defendants to take the stand and give testimony that they in fact had violated the registration provisions of the Securities Act, a criminal offense. This was baldly stated by the Commission's attorney before Judge Sugarman as recently as November 1 and November 4, 1957. Indeed, after having commenced its civil action in the District Court, and in the period when it was seeking

a temporary injunction and, under the Federal Rules of Civil Procedure, could not yet commence discovery, the Commission unsuccessfully sought to use its own administrative process to compel the defendants to appear at the SEC, deliver all their books and records to the Commission, and there give testimony against themselves as to the very matters in issue in this civil action. This was prior to the time that any of the defendants consented to injunctions.

On May 18, 1957, the Commission obtained a subpoena from the Clerk for the District Court directed to the petitioner, requiring him to appear and testify on June 10, 1957 in the trial of this civil action. Such subpoena was served on petitioner at New Hope, Pennsylvania, on May 18, 1957, a date subsequent to the entry of the final injunction against him. Such subpoena was not for the purpose of taking petitioner's deposition, but for the purpose of having him testify at the trial itself.

Petitioner's counsel was continuing to receive daily transcripts of the pre-trial conferences which were in process before Judge Sugarman. Such transcript made it quite clear that the trial would not commence on June 10, 1957, but would in fact go over to the fall. Thus, at page 34 of the May 20, 1957, transcript (two days after petitioner had been served with the subpoena) Judge Sugarman commented that he did not take trials as the result of a motion assignment, and that it might be necessary for the parties to go to the Chief Judge and request him to assign the case for trial.

On June 4, 1957 (at pp. 261 and 262 of the transcript), Judge Sugarman suggested that *the pre-trial conferences continue on an informal basis between the parties through June 24, and that the formal pre-trial conference reconvene before him on June 25.* On the same day, Judge Sugarman said (p. 277) "I am thinking in terms of the trial going ahead in October", and indicated that October

7. 1957, might be a suitable date for the trial to commence, subject to possible agreements between the parties. (Appendix B hereto, *infra,* pp. 50-51.)

Petitioner was informed of this by his counsel, and was advised that the trial would not actually commence until the fall, and that accordingly his testimony would not be required on June 10. On June 10, 1957, Judge Sugarman announced that he would continue with the pre-trial conferences on June 25 and from day to day thereafter, and that the trial itself would be adjourned until October 7, 1957. Nevertheless, he said that he was formally convening the trial itself on June 10, 1957, for the purpose of retaining jurisdiction over witnesses subpoenaed to appear and testify that day. Having thus convened the trial, he adjourned it and pre-trial conferences continued for five months thereafter. (Appendix B hereto, *infra,* pp. 52-5.)

Prior to June 27, 1957, all of the defendants over whom jurisdiction had been obtained, with the sole exception of Reldan Trading Corporation and Benjamin C. Cohen, had consented to the entry of final injunctions against them, and there remained for disposition only the issues between the Commission on the one hand, and Reldan Trading Corporation and Cohen on the other.

On October 4, 1957, petitioner was in Montreal, Canada on business. While in Montreal, he telephoned Miss Susan Miller, a member of his secretarial staff at Doeskin Products, Inc. in New York City, at about half-past eleven in the morning. He told Miss Miller that he had to be in Havana, Cuba, to keep an important business engagement the following morning, and that he was flying out of Montreal on Eastern Air Lines Flight No. 45, which was scheduled to arrive at LaGuardia Field in New York City at 4:36 P. M. He instructed Miss Miller to arrange transportation for him out of New York to Havana via Miami on the next available flight following his arrival. Since the planes for Miami and Havana depart from Newark Air-

port, he also requested her to meet him at LaGuardia Field with transportation to take him to Newark to catch this flight. Miss Miller followed these instructions.

Through means available to the Commission, the information given to Miss Miller by petitioner on the telephone became known to representatives of the Commission. When petitioner's plane arrived at LaGuardia Field at 4:50 P.M., representatives of the Commission were on hand to serve petitioner with a subpoena calling for his appearance as a witness at the *Swan-Finch* trial on October 7, 1957. The record of the pre-trial conferences discloses that on the date on which the subpoena was served (and in fact for several days prior thereto) the representatives of the Commission, and the attorneys for Reldan, were both aware that it was impossible for the trial to commence on October 7, 1957, and that the pre-trial conferences would continue for at least ten days thereafter.

An affidavit of Miss Miller, and an affidavit of Louis Schwartz (the driver employed to take Miss Miller to LaGuardia Airport to wait there for the arrival of petitioner, and then to drive petitioner to Newark Airport to board a plane for his journey to Havana), establish that petitioner's arrangements to travel to Havana were in fact made prior to his being served with a subpoena. (Appendix B hereto, *infra*, pp. 107, 108, 72-73.) On November 1, 1957 Miss Miller (although not herself subpoenaed) voluntarily appeared before Judge Sugarman, and counsel for the Commission neither then or later challenged her statements nor sought to put questions to her. (Appendix B hereto, *infra*, pp. 71-2.)

Because of the necessity of keeping his business engagement in Havana, petitioner proceeded to fly to Havana after having been served with the subpoena. It would have been possible for petitioner, after keeping such engagement, to have returned to New York prior to October 7 at 10:30 A.M., if he had been able to do so.

However, on October 5, 1957, while in Havana, petitioner became seriously ill and came under the care of Dr. Augusto Usategui Lazama, an eminent Cuban physician. It became necessary for petitioner to be placed in the Sacred Heart Hospital in Havana for extensive medical treatment, including biopsies. Petitioner's physician found petitioner to be in a complete state of exhaustion, and ordered, among other things, absolute rest. The report of the physician, which was filed with Judge Sugarman and which was never challenged by the Commission, indicated that petitioner would not be able to leave his care in Havana for a period of sixty days. (Appendix B hereto, *infra*, pp. 70, 71.)

On October 7, 1957 (the return day of the subpoena), Judge Sugarman stated "We are going to continue on our pre-trial conference." There was not even a suggestion that anyone expected the trial to get under way at that time. (Appendix B hereto, *infra*, p. 54.)

That same day the attorney for the SEC advised the Court that petitioner had been served on October 4 with a subpoena calling for his appearance at the trial on October 7, and that petitioner was not in the courtroom. The Commission's attorney informed the Court that it was essential for the Commission's case that it have the testimony of petitioner, one of the defendants in the action. He then requested the Court to issue a bench warrant for petitioner, saying: "I would suggest your Honor issue a bench warrant or something *to insure his appearance* here" (Transcript, p. 326). (Appendix B hereto, *infra*, p. 54.)

It is a significant and critical fact that then, as in every subsequent reference both by the attorney for the SEC and by the Court, whenever reference was made to initiating contempt proceedings against the petitioner, or issuing a warrant for his arrest, that it was always stated that

the sole purpose of taking such action was coercive and to compel petitioner to leave Cuba and come to New York (despite his illness) and give testimony for the SEC in the action in which he was one of the defendants. Indeed, on December 2, 1957, Judge Sugarman conceded on the record that "Everything we did while the trial was still not concluded by the confession of judgment by the remaining two defendants was intended for the purpose of getting him here to testify." (Appendix B hereto, *infra*, pp. 103, 100.)

At this same pre-trial session, Judge Sugarman directed the SEC attorney to communicate with petitioner's office in New York, and with petitioner's counsel, in the injunction action, in an effort to ascertain why petitioner had failed to appear. In compliance with this request from the court, petitioner's counsel ascertained what had occurred, and requested and received a certificate from petitioner's physician, which he turned over to the attorney for the SEC early in the morning of October 11, 1957.

On October 10, 1957, when the pre-trial conference again reconvened before Judge Sugarman, the attorney for the SEC again adverted to the impossibility of the Commission going to trial without having petitioner (one of the defendants) available as a witness for the SEC. Again, he requested that the Court issue a bench warrant *to insure petitioner's appearance as a witness*). (Appendix B hereto, *infra*, p. 55.)

Judge Sugarman then said, at pages 347 and 348:

> "Now, I feel the better practice would be for an order to show cause to issue, and I have not researched it, but I have the notion that order to show cause could be served anywhere, at least within the territorial United States; that an order to show cause why he should not be punished should be the first document, *and then I feel that he should be given an opportunity of coming*

in and making himself right with the Court. However, then, if he ignores that, as he has ignored the subpoena, then I believe the Court in order to preserve its own dignity and authority would have no recourse but to issue a warrant for his arrest. * * * However, I don't think, particularly in the light of Mr. Wels' statement that Mr. Birrell is suffering from nervous exhaustion and is under the care of doctors—in the light of that statement and on the basis that there may be some truth in it—and I emphasize the word '*may*'—I feel that it would be untoward for the Court to immediately issue a warrant for his arrest. I think he should be given an opportunity by means of a show cause order." (Appendix B hereto, *infra*, pp. 56, 57.)

Continuing at page 351, Judge Sugarman said:

"Now while I recognize that the cryptic language appears in Rule 42(b) that I may order his arrest, I think that while it might not be an abuse of discretion, it certainly would be a highhanded process for me to resort to an order of arrest without first availing ourselves of the order to show cause which as an alternative, a prior alternative, appears in the rules."

The Court then appointed Mr. Devaney, the attorney for the plaintiff Securities and Exchange Commission in the civil action then before the Court, to prepare and submit to him an order to show cause why petitioner should not be held in contempt. (Appendix B hereto, *infra*, p. 59.) At the end of that day, the pre-trial was still not completed and was adjourned until October 15, 1957.

The order to show cause was then prepared by the attorney for the SEC, and was signed by Judge Sugarman on October 11, 1957 at 4:45 P.M. The application for the order for petitioner to show cause why he should not be held in contempt was not only signed by Mr. Devaney, but

also was signed:

"SECURITIES AND EXCHANGE COMMISSION
By THOMAS G. MEEKER
General Counsel
PAUL WINDELS, JR.
Regional Administrator
WILLIAM D. MORAN
Assistant Regional Administrator
EILEEN E. EVERS
Attorney"

The order to show cause contained a requirement, inserted in ink by Judge Sugarman, that

> "Service shall be made personally by United States Marshal upon Lowell M. Birrell on or before the 23rd day of October 1957, on or before 5 P. M." (Appendix B hereto, *infra*, pp. 109, 110.)

Such service was never effected upon petitioner, and the record of the proceedings before Judge Sugarman so shows. Despite this, the warrant subsequently issued for petitioner's arrest is stated to be issued because "petitioner failed to respond personally to an Order to Show Cause, duly issued on the 11th day of October 1957." If there is any meaning to the procedural requirements which caused Judge Sugarman to require that personal service be made upon petitioner, it is inconceivable that in the absence of such personal service a Court would issue such a warrant. (Appendix B hereto, *infra*, p. 126.)

On October 14, 1957, the attorney who had appeared as counsel for petitioner and certain other defendants in the civil injunction action *was served with a subpoena* directing him to appear on November 1, 1957 (the return date of the order to show cause) and testify in the contempt proceedings initiated against petitioner who had been his client.

He obeyed that subpoena, and at the conclusion of the November 1 hearing was directed by Judge Sugarman to appear again on November 4. At the conclusion of the November 4 hearing, he was again directed to appear on November 20. On each of such occasions he was directed by the Court to communicate with petitioner and ascertain information indicating "*when and where*" *petitioner's* testimony could be obtained. (Appendix B hereto, *infra*, pp. 78-9, 81, 84, 88-9.)

On November 1, the return date of the order to show cause, the counsel for the SEC informed the Court that the United States Marshal had *not* effected service on petitioner as specifically required by the order. Petitioner's attorney in the injunction proceedings, present in court pursuant to the subpoena served upon him at the instance of the SEC, presented to the Court the medical certificate attesting to petitioner's condition and hospitalization. He also stated to the Court at that time:

> "Now, your Honor, I thought that before coming here this morning I should find out the current status of the situation, and last evening I called the overseas operator and placed a call to Mr. Birrell and I received a call this morning just before I left.
>
> Mr. Birrell has asked me to state to the Court that as soon as he is advised by his doctor in Havana, and the doctor feels that he can come back here to New York, that he will be here to testify in this contempt proceeding and in these other proceedings. He has also asked me to tell the Court that in the event that there is some time urgency, some time pressure with respect to getting his testimony as to these Reldan matters, that he would be very glad to cooperate with the Court to the extent of giving a deposition in Havana and answering whatever questions may be put to him." (Appendix B hereto, *infra*, p. 76.)

In the course of this court session, Judge Sugarman said:

> "I have been under the impression that the SEC cannot proceed in the trial of this complaint against the remaining defendants, Reldan and Cohen, without having Birrell's testimony; is that correct?"

Mr. Devaney, counsel for the SEC, advised the Court that this was correct. The Court then inquired whether it would not be possible to resolve this entire matter by taking petitioner's deposition in Havana. To this Mr. Devaney replied:

> "Your Honor, after discussing this with Mr. Windels, we believe that Mr.. Birrell is an adverse witness. We think that although we may be able to get some facts by means of deposition, the better way is to have Mr. Birell here in court." (Appendix B hereto, *infra*, p. 77.)

The Court then directed that the hearing be adjourned until November 4. He directed the representatives of the SEC to determine whether they might not be able to get what they sought by deposition, and he directed petitioner's counsel in the injunction proceedings to communicate with petitioner, and be in a position to inform the Court whether, if petitioner's testimony were taken by deposition, he would waive all objections to any questions propounded. The Court also instructed him to have a further statement from petitioner's physician as to when he feels that petitioner may be in a condition of recovery and reduction permitting petitioner to come back to New York and testify at the trial.

Certainly there was no question at this point but that petitioner had made out a proper excuse for his failure to respond to the subpoena, and had demonstrated a willingness to cooperate with the Court to the extent of

providing the information which the SEC sought. There is no doubt that if the Commission had been willing to proceed with the taking of petitioner's deposition at that point, no further steps would have been taken in the contempt proceedings as they would have accomplished their coercive purpose, a purpose which was clearly stated by Judge Sugarman in his closing remarks on November 1:

> "In any event, I don't think beyond the issuance of a bench warrant that I could do anything today. *And I am not disposed to do that until we explore every other method of getting the end result, that is, the testimony of Mr. Birrell.*" (Appendix B hereto, *infra*, p. 81.)

When the hearing was reconvened on November 4, counsel for petitioner in the injunction proceedings (again present pursuant to the instructions of Judge Sugarman) stated to the Court:

> "Your Honor, I communicated with Mr. Birrell, as your Honor instructed. While your Honor seems to have come to the conclusion that the deposition would not be satisfactory, I feel that for the purpose of the record I would like to place before your Honor the statements that I received with respect thereto.
>
> I discussed with Mr. Birrell the question of limiting the scope of the deposition, and we concluded that so far as this matter stands at the present time, it is a matter between the Commission and Reldan, that Mr. Birrell appears as a witness, and as a witness of course he would be free to invoke any Constitutional rights which he might have; he would also be free to invoke the privilege of attorney and client to decline to discuss any communications that he might have received as an attorney with respect to the matter.

As to anything else, he would have no status whatever to make any objections on any ground to any questions which Mr. Devaney or any member of the staff of the Commission would put to him, and if a deposition was conducted he would not propose to attempt to make any such objections.

Of course, so far as the defendants are concerned, Reldan is a party, and I have not discussed this with the attorneys for Reldan, but I would assume that they would be present at any deposition or at any examination in this courtroom, and that they would be free to make whatever objection to anything they might want to make.

But, so far as Mr. Birrell is concerned, apart from any constitutional rights or any privileged communications that might be involved, he would be available to answer any questions which the Commission might put to him and to which the Reldan people might not make any objection." (Appendix B hereto, *infra*, pp. 84, 85.)

The Court was also advised that petitioner's physician still considered it inadvisable for petitioner to proceed to New York.

Counsel for the SEC at this hearing rejected the offer to take petitioner's deposition. Mr. Devaney told the Court that he had been in consultation with attorneys for the plaintiff in a stockholders' suit in which petitioner is a defendant, and that they had informed him that petitioner intended to leave Cuba for Europe. *He admitted that he had not been able to substantiate this information*, and, again, he requested the Court to issue a warrant for petitioner's arrest so that petitioner's passport could be picked up, and petitioner thus coerced to return to New York to testify. The following colloquy took place:

"Mr. Devaney: Another fact which was presented to us Friday afternoon, which I cannot substantiate,

is that Mr. Birrell intends to leave Cuba and go to Europe. Now, if we have—

The Court: If I issue a bench warrant, how is that going to stop him?

Mr. Devaney: That will enable us to go to the State Department to have his passport picked up so that the only place he could return to would be here from Cuba.

The Court: Can I issue that to the State Department under the present state of the record?

Mr. Devaney: That is right, your Honor. I have been advised through Mr. Windels that they have been in touch with the Passport Division and that unless there is a warrant of arrest they can do nothing about his passport.

The Court: What about that?

Mr. Wels: I have no indication whatever, your Honor, that Mr. Birrell has any intention of going to Europe. Mr. Birrell has told me that as soon as he is permitted by his doctor to leave Cuba he is coming to New York because he has many pressing problems to take care of here. • • •

The Court: Let us interrupt you and inquire of Mr. Devaney: Suppose I were to adjourn this matter until the 20th and at that time no satisfactory indication as to a fixed date when Mr. Birrell would return and I would issue a bench warrant at that time but Mr. Birrell was still in Cuba, and putting it on that first hypothesis your position would be no different than it is today, is that correct?

Mr. Devaney: That is correct.

The Court : On the other hand, supposing he has gone to Europe, he would have gone on an American passport, is that correct?

Mr. Devaney: That is right.

The Court: How would you be prejudiced by my issuing a bench warrant then and having his American

passport picked up and bring him back from wherever he is in Europe as distinguished from Cuba? You do not expect that he is going to the Soviet Union, do you?

Mr. Devaney: I can't answer that. I don't think so, your Honor. The only question there is that we will then be faced with the problem of locating Mr. Birrell again with additional expense—

Mr. Wels: The Commission won't have any difficulty in locating Mr. Birrell and the Commission isn't going to have any additional expense.

The Court: The matter is adjourned until 10:30 on November 20th for all purposes. At that time I expect a definite statement from you, Mr. Wels.

Mr. Wels: Yes, sir.

The Court: *As to whether or not Mr. Birrell will be available to participate as a witness in the trial."* (Appendix B hereto, *infra,* pp. 87, 88, 89.)

Certainly up to this point the only purpose which the Court, the Commission, or anyone else had attributed to the contempt proceedings and the possible issuance of a warrant was the end result described by Judge Sugarman —coercing petitioner to return to New York and give testimony at the trial of the two remaining defendants, Reldan and Cohen.

On November 18, 1957, Reldan Trading Corporation and Cohen executed consents to the entry of final injunctions against them, and such final injunctions were entered the same day. On the same day the Commission issued a press release announcing the entry of these injunctions, and stating that this terminated those proceedings. (Appendix B, hereto, *infra,* p. 90.) Thus, the suit for a civil injunction came to an end without the necessity of a trial. It was no longer possible for petitioner to participate as a witness at the trial, and thus accomplish Judge Sugarman's end result. And, as will appear, this event terminated

the jurisdiction and authority of the Court to continue with the contempt proceedings initiated against petitioner, or to issue a warrant for his arrest.

On November 20, 1957 (two days after the conclusion of the main case) Judge Sugarman reconvened the hearings. Judge Sugarman acknowledged that "It is quite true that the main case has now been entirely settled", but stated that he still had to dispose of the contempt proceedings.

Significantly, the transcript plainly shows that the SEC placed no additional information relating to petitioner in the record. Indeed, the only statements from Mr. Devaney that appear in the record for that day are "Yes, your Honor, that will be done"; "That will be done, your Honor"; "Thank you, your Honor".

Despite this barren record, the following occurred:

> "The Court: Then I think, for the purpose of initiating such action by the State Department as may be necessary to lift his passport to get him here, I am going to request the SEC or counsel for the SEC to present to the Court for signature a bench warrant.
>
> Mr. Devaney: Yes, your Honor, that will be done.
>
> Mr. Wels: May I suggest to your Honor that this seems to me to be a completely unnecessary step for the Court to take.
>
> The Court: May I suggest, Mr. Wels, that it does not seem completely unnecessary to me. The only thing is, I have the notion that he is trifling with the Court.
>
> Mr. Wels: I can assure your Honor that as soon as he is able to do so he will be in New York, that he will make himself available.
>
> The Court: Well, the bench warrant may be the modus operandi for his being in New York before he is released from Cuba, because I understand that he is in Cuba by virtue of an American passport.

I want to know why he did not come here on October 7, and I intend to hold a hearing to find out why he did not come.

Now if he can persuade me, or better yet, I think the burden is on the plaintiff, the SEC,—if they can persuade me that his absence on October 7th was deliberate and calculated, that there was no basis because of the condition of his health for him not to have remained, then I intend to hold him in contempt.

On the other hand, it is a proceeding very much akin to a criminal proceeding, and I believe that the quantum for judgment is reasonable doubt rather than a preponderance of the evidence. But I intend to hold a hearing and I intend no longer to await Mr. Birrell's convenience.

Mr. Wels: Your Honor, this is not a matter of his convenience, but it is a matter of a medical situation. I am sure that your Honor would not want to jeopardize his physical recovery.

The Court: Well, we have pretty good doctors in New York, the best in the world, and as good as the Cuban doctors, I am sure, and if he has fatty tissue around the heart he can rest here as well as he can in Havana.

So, under the circumstances, I am now instructing the counsel for the SEC to present a bench warrant for Mr. Birrell's apprehension.

Mr. Devaney: That will be done, your Honor.

The Court: As soon as he is apprehended, by whatever devices are employed to get him back here, we will set a date for a hearing and you have notice thereof, counsel, so that he can be prepared and understands fully what is expected of him. In other words, I will expect of him to meet an issue which is imposed upon the Government to show that his absence on October 7 was deliberate and calculated and not justified by his condition.

Mr. Devaney: Thank you, your Honor." (Appendix B hereto, *infra,* pp. 92, 93, 94.)

Accordingly, a warrant for petitioner's arrest was issued on November 20 1957. Such warrant commanded the United States Marshal "to arrest Lowell M. Birrell and bring him forthwith before the District Court for the Southern District of New York in the City of New York, for the reason that he wilfully failed to appear after having been served with a subpoena to appear at the trial of the case of *Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.,* on the 7th day of October 1957, and thereafter having failed to respond personally to an Order to Show Cause, duly issued on the 11th day of October 1957." (Appendix B hereto, *infra,* p. 126.)

On November 20, 1957, no hearing had been held on the question of whether petitioner had in fact wilfully failed to respond to a subpoena of the Court, and had wilfully failed to respond to an order to show cause. Indeed, the order to show cause contained a requirement that personal service must be effected on petitioner prior to October 23, 1957, and the United States Marshal reported to the Court that he had *not* effected service. (Appendix B hereto, *infra,* p. 66.)

Yet the warrant does not state that petitioner was *charged* with having wilfully failed to appear in Court pursuant to the Court's subpoena, and with wilfully having failed to respond to such order to show cause. To the contrary, such warrant (issued by order of Judge Sugarman) states that petitioner wilfully *did* these things. The language of the warrant carries more than an implication that petitioner had in fact been convicted of these charges despite the fact that the record of the Court shows nothing to indicate that a hearing was held, and that a judgment of conviction was entered. It is this warrant in this form (with its implied statement of a conviction which has not

occurred) that has been exhibited to the Department of State, to the United States Embassy in Havana, and to the Cuban Government.

This warrant issued on Judge Sugarman's instructions does not reflect the presumption of innocence which the Constitution and the Bill of Rights require; to the contrary, it reflects a presumption on the part of the court of petitioner's guilt despite the fact that no hearings had been held, and that the order to show cause had not been served upon him.

Despite the fact that the court record of November 20, 1957, discloses no statements from Mr. Devaney, the attorney for the SEC, beyond "That will be done, your Honor", and "Thank you, your Honor", the press accounts relating to the issuance of the warrant quote Mr. Devaney himself as to statements which he made to the Court resulting in the issuance of the warrant. None of those statements were made in open court, or in the presence of petitioner's counsel, and, even if they had been made, they were not correct. A letter to Mr. Devaney the next day calling for a statement as to whether statements were made to the Court other than those that appear on the public record, and calling for copies of statements that may have been made outside of the record and on an *ex parte* basis, has never received reply. (Appendix B hereto, *infra*, pp. 127, 128.)

On November 25, 1957, petitioner, appearing specially, submitted to the *ex parte* Judge in the District Court an application for an order directing the SEC to show cause why the order directing the issuance of a warrant should not be vacated, on the ground that the issuance of the warrant and the continuation of the contempt proceedings after the conclusion of the main case were beyond the jurisdiction and authority of the Court. Such application also sought a stay.

Such application was referred by the *ex parte* Judge to Judge Sugarman, who signed the order but denied the stay. The order to show cause was made returnable on December 2, 1957, before Judge Sugarman. When copies of the papers were served upon the counsel for the SEC, he insisted upon subscribing the admission of service as "Attorney for Judge Sugarman".

On December 2, after argument between Judge Sugarman and counsel for the petitioner, in which counsel for the SEC, although present, did not participate, Judge Sugarman denied the motion. (Appendix B hereto, *infra*, pp. 106, 129.) Thereafter, a petition to the United States Court of Appeals for the Second Circuit for a writ of prohibition and mandamus was filed and served on December 4, 1957.

The petition came on for a hearing in the United States Court of Appeals for the Second Circuit on December 9, 1957. The court consisted of Judges Medina, Lumbard, and Waterman. The court denied the petition from the bench, without reading or examining the briefs submitted that day to the court, in the midst of the argument of petitioner's counsel, and without hearing from the attorney for the Securities and Exchange Commission. Judge Medina stated that the court wished to discourage the filing of petitions for writs of prohibition, and that it did not intend to permit the authority of the District Court to be whittled away by encouraging the filing of petitions for writs of prohibition.

Questions Presented

Whether proceedings to hold in contempt a person who has failed to respond to a subpoena calling for his appearance as a witness at a trial are proceedings for civil contempt where it is repeatedly stated that their sole purpose is to coerce the person subpoenaed to respond to it and testify.

Whether, after the action in which such testimony is sought has been terminated and completed, the District Court may proceed with criminal contempt proceedings against such person based on the same conduct on which such civil contempt proceedings have been based, and where such person has been led to believe that the sole purpose of the contempt proceedings is to coerce his testimony.

Whether petitioner has been accorded due process of law when

(a) Trial subpoenas are issued for a date when it is known to court and to counsel that the trial can not and will not commence;

(b) A United States District Judge perpetrates the fiction of announcing that a trial has started solely for the purpose of seeking to retain jurisdiction over persons subpoenaed as witnesses for that day, when the trial has not in fact commenced, and pre-trial proceedings are to continue for a period of several months thereafter;

(c) A subpoena is issued to the attorney for a defendant in an action involving an offense against the United States to testify for the Securities and Exchange Commission on the issue of whether his client has been guilty of contempt of court;

(d) Contempt proceedings are instituted by a United States District Judge, at the instance of the Securities and Exchange Commission, to induce the United States Department of State to withdraw passport facilities theretofore issued to a defendant in such action whose testimony the Commission desires to compel and coerce;

(e) Persistent and repeated efforts are made by the Securities and Exchange Commission and a United States District Judge to compel and coerce a defendant in an action involving an offense against the United States to testify in such action;

(f) Counsel for the Securities and Exchange Commission, not in open court and on an *ex parte* basis, without opposing counsel being present, communicates information to the United States District Judge calculated to create the false belief that petitioner has been trifling with the court (Appendix B hereto, *infra*, pp. 127-8);

(g) Counsel for the Securities and Exchange Commission, having in their possession a certificate from petitioner's physician attesting to his ill health and the reasons for his inability to respond to the subpoena of the Court, fail to include such statement in the application for an order to show cause to hold petitioner in contempt of court for failing to respond to such subpoena;

(h) Contempt of court proceedings, which are stated to be for the sole purpose of coercing petitioner to testify in a civil action in the United States District Court, and so constitute civil contempt, are continued beyond the termination of the action in which such testimony is sought;

(i) A warrant is issued reciting that petitioner has "wilfully failed to appear after having been served with a subpoena to appear at the trial of the case of *Securities and Exchange Commission* v. *Swan-Finch Oil Corp. et al.*, on the 7th day of October, 1957, and thereafter having failed to respond personally to an Order to Show Cause, duly issued on the 11th day of October, 1957" when no hearing has been held to determine whether petitioner was guilty of such conduct, and when petitioner was not in fact served with such order to show cause, though service upon him was required by the terms of the order itself;

(j) Service of petitioner's motion papers to vacate and quash such warrant was admitted by the attorney for the Securities and Exchange Commission as "attorney for Judge Sugarman", and thereafter such motion was heard and determined by the judge whose attorney the attorney for the Securities and Exchange Commission stated that he was;

(k) The United States Court of Appeals denied petitioner's petition to such Court for a writ of prohibition from the bench without examination of the briefs presented, and for the stated purpose of discouraging petitions for writs of prohibition.

Reasons for Granting the Writ

1. As a matter of law the acts of which petitioner has been charged constitute at most a civil contempt, and this is not affected by the fact that they may be labelled "criminal contempt"; upon the termination of the injunction action the District Court no longer had jurisdiction or authority to continue with proceedings to punish such a contempt.

For many years the leading and controlling authority on civil and criminal contempts has been the decision of this Court in *Gompers* v. *Bucks Stove & Range Company*, 221 U. S. 418. When the order to show cause to quash the warrant of arrest was argued on December 2, 1957, before Judge Sugarman, the Judge conceded the controlling character of the *Gompers* decision, at least until November 25, 1957, when this Court handed down a decision in *Yates* v. *United States*. Judge Sugarman did not contend that the *Gompers* decision was reversed by the *Yates* case, but he felt that the decision in the *Yates* case nevertheless justified him in continuing with the contempt proceedings despite the termination of the main case.

In the *Gompers* case, the labor leader, Samuel Gompers, and others, were prosecuted for criminal contempt of court for failure to comply with an order of the District Court. Despite the fact that Gompers had been prosecuted for criminal contempt, and had been sentenced to a definite term of twelve months' imprisonment, and that the conviction for criminal contempt had been sustained as such by the Circuit Court of Appeals, the Court nevertheless

reversed. The ground of the Court's decision was that, despite the label of criminal contempt, the defendants' conduct constituted no more than civil contempt, and that, since the action in which the contempts had occurred had terminated, the contempt proceedings likewise abated, and the courts were powerless to impose punishments.

The Court, in the *Gompers* case, laid down certain standards by which it might be determined whether particular conduct and particular proceedings were civil contempt or criminal contempt. By every one of those standards, the conduct with which petitioner here is charged constituted at most civil contempt and the proceedings instituted against him, even though labeled criminal contempt, were in fact civil contempt proceedings.

The Court said in its opinion that where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory, the contempt is civil, and the sanctions which the Court can invoke are remedial in character for the purpose of coercing the defendant into doing what he has refused to do. The Court cited as examples the cases of a defendant who refused to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance. In such cases, the penalty is coercive and remedial for the defendant carries the keys to the prison in his pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

On the other hand, the Court said, where the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished, and a criminal contempt has been committed. There any sanction is imposed not for its coercive effect but solely as punishment for its disobedience.

It is the purpose of the contempt proceedings which is also determinative of whether particular proceedings, however labeled, are civil or criminal. Where they are initiated for the purpose of coercing the defendant to do that which he has been ordered to do and refused to do, said the Court, they are civil in nature.

On both of these counts the conduct with which petitioner has been charged, and the contempt proceedings instituted against him, are civil and not criminal contempt.

Petitioner had been served on October 4, 1957, with a subpoena calling for his appearance in the District Court on October 7 to testify as a witness for the SEC in an action in which he himself was a defendant. He was served at the airport while en route to Cuba where he had to keep an important business engagement the following day. Had he been able to do so, he could have kept that appointment and still been on hand in court on October 7. But while in Cuba the following day he became ill, and his physician found it necessary to hospitalize him. His physician, in the statement which was filed with the Court, indicated that the treatments which were necessitated would not permit petitioner to return to New York for a period of sixty days. Nevertheless, petitioner voluntarily, and without the suggestion of the Court or of the Commission, offered to give such testimony as might be required by oral deposition in Havana in the meanwhile and to answer questions which might be put to him without objection. The medical reports were never challenged by the Commission. Surely his failure to appear was excusable on this record within the meaning of Rule 45 of the Federal Rules of Civil Procedure which provides in clause (f) that "Failure by any person *without adequate excuse* to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena is issued."

Petitioner's conduct in failing to respond to the subpoena constituted a failure to do an affirmative act required by the subpoena, and so was civil contempt, if not excusable, under the decision in the *Gompers* case. Judge Sugarman rejected this contention and this decision and ruling, saying that petitioner "did an affirmative act on October 4th in getting off a plane at LaGuardia Field when he was served with a subpoena and proceeding by taxicab over to Newark and getting on another plane and going to Miami and then getting on another plane and going to Cuba and remaining there. I don't think that the question whether a contempt is civil or criminal hinges upon whether the act is one of commission or omission, because if that is the rationale of your argument I can't accept it" (Transcript, December 2, 1957, p. 56; Appendix B hereto, *infra*, p. 101.)

The entire record of these proceedings demonstrates that coercion was their entire purpose. On each and every occasion that counsel for the Commission and the Court referred to the initiation of contempt proceedings, or the possibility of issuing a warrant, it was stated that the purpose was to insure petitioner's appearance in the District Court as a witness in the case against Reldan and Cohen. And, on November 1, subsequent to the initiation of the contempt proceedings, Judge Sugarman stated (Transcript, November 1, 1957, p. 27; Appendix B hereto, *infra*, p. 81): "In any event, I don't think beyond the issuance of a bench warrant that I could do anything today. *And I am not disposed to do that until we explore every other method of getting the end result, that is, the testimony of Mr. Birrell.*" If the end result of the contempt proceedings was designed to be getting the testimony of petitioner, could their purpose have been anything but coercion, and could the proceedings have been anything but civil contempt proceedings?

In the *Gompers* case, the Court laid down still another standard for determining whether particular proceedings

fell in the category of civil contempt or criminal contempt. It said:

> "There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main case. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. • • • The Bucks Stove & Range Company was not only the nominal but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers, and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States. It appears here also as the sole party in opposition to the defendants; and its counsel in its name have filed briefs and made arguments in this Court in favoring affirmance of the judgment below."

Here, too, the facts fit this additional standard laid down by the Court. The oral request that contempt proceedings be instituted against petitioner was made by the attorney for the SEC in the civil action instituted by it, and such request was made for the avowed purpose of coercing petitioner into testifying on behalf of the SEC in such civil action. The formal application for the institution of such contempt proceedings was subscribed not only by the attorney for the SEC, but on behalf of the Securities and Exchange Commission itself by Thomas G. Meeker, General Counsel; Paul Windels Jr., Regional Administrator; William D. Moran, Assistant Regional Administrator; and Eileen Evers, Attorney. The order to show cause in the contempt proceeding bore the back of the SEC. When Judge Sugarman, on November 20, decided to issue a

warrant, he said: "I am going to request the SEC or counsel for the SEC to present to the Court for signature a bench warrant". In all of the court sessions dealing with the contempt proceedings, the discussion of record related to the civil action for an injunction, and to the manner in which the testimony required by the SEC to prove its case might best be obtained.

In fact, the only occasion on which counsel for the SEC sought to mask his status in another role was when he endorsed the admission of service on the order to show cause why the warrant should not be vacated as "attorney for Judge Sugarman". Even thereafter the order submitted to Judge Sugarman described him as attorney for the Securities and Exchange Commission.

Finally, the Court in the *Gompers* case laid down another standard by which the conduct charged and the proceedings here must necessarily fall in the category of civil contempt. The Court said:

> "In another most important particular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the company, and, as such, each was required to testify against himself—a thing that most likely would not have been done, or suffered, if either party had regarded this as a proceeding at law for criminal contempt, because the provision of the Constitution that 'no person shall be compelled in any criminal case to be a witness against himself', is applicable, not only to crimes, but also to quasi-criminal and contempt proceedings. • • • Congress in recognition of the case has also declared that the courts of the United States shall have power to punish by fine or imprisonment contempts by their authority including disobedience by any party to any lawful order of the said courts. But the very amplitude of the power

is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper. For that reason we can proceed no further because it is both unnecessary and improper to make any decree in this contempt proceeding."

The SEC sought to make petitioner testify in an action in which he, along with others, was charged with having violated the registration provisions of the Securities Act of 1933, a criminal offense under the statute. When he failed to respond to the subpoena, and contempt proceedings were initiated against him, the Court made it plain that he was expected to testify in those contempt proceedings. Thus, on October 10, 1957, when Judge Sugarman determined that he would institute contempt proceedings, he said (Transcript, October 10, 1957, pp. 347 and 348): "* * * An order to show cause why he should not be punished should be the first document, *and then I feel that he should be given an opportunity of coming in and making himself right with the Court*". Did not this necessarily mean that petitioner was expected to come in and testify in the contempt proceedings? Again, on November 20, 1957, when Judge Sugarman directed the issuance of the warrant, he said he expected to hold a hearing to find out why petitioner did not come to court on October 7, and added: "*Now, if he can persuade me* * * *"". Surely this indicated an expectation on the part of the court that petitioner would testify in the contempt proceedings. And it indicated that the Court had a presumption of petitioner's guilt rather than of his innocence. Similarly, when the warrant for petitioner's arrest was issued, instead of reciting that he was charged with certain conduct, it in fact stated that he had wilfully committed the acts charged, even though no hearing had been held. Here again the Court disclosed the presumption of guilt which has affected all of these proceedings.

In the *Gompers* case, too, the Court held that it was not a controlling factor how the case was captioned or treated

as a matter of form. Despite the fact that the proceedings below had been treated as criminal contempt, it found them in fact to be civil contempt. And it concluded:

> "For, on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of *Bucks* v. *The American Federation of Labor, et al.* This court therefore declined to consider the case, which had become moot, and those two appeals were dismissed. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled. * * * The present proceeding necessarily ended with the settlement of the main cause of which it is a part."

In a series of cases since the *Gompers* decision, both this Court and the Courts of Appeal have reaffirmed and implemented it.

In *Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585, the SEC obtained from the United States District Court in California an order directing one Young, an officer of the company under investigation, to produce certain books and records. Young persisted in his noncompliance with the court order, and, as here, the Commission obtained an order to show cause why he should not be held in contempt. Young was found by the District Court to be in criminal contempt, and the District Court imposed a fine. The SEC, contending that such conduct was civil rather than criminal contempt and that the contempt proceedings were coercive and remedial, appealed. On appeal, this Court held that conduct of such a character was in fact civil contempt. Speaking for the Court, Mr. Justice Douglas said, at page 590:

> "It is the nature of the relief asked that is determinative of the nature of the proceeding. *Lamb* v. *Cramer,*

285 U. S. 217, 220. This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest. See *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 445. The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena. The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production.

Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do', *Gompers* v. *Buck Stove & Range Co., supra,* p. 442, the remedy is one for civil contempt. *United States* v. *United Mine Workers,* 330 U. S. pp. 258, 303. Then 'the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.' *McCrone* v. *United States,* 307 U. S. 61, 64. One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.' *In re Newitt,* 117 F. 448, 461. Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do. * * * The issue thus raised poses a problem in civil, not criminal, contempt."

In *McCrone* v. *United States,* 307 U. S. 61, the Court was concerned with the question of whether the failure on the part of a witness to comply with a court subpoena issued in connection with an internal revenue investigation was a civil or a criminal contempt. Speaking for the Court, Mr. Justice Black said:

"While particular acts do not always readily lend themselves to classification as civil or criminal con-

tempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses committed against the public.

Here, the summons served on petitioner required only that he testify in a tax inquiry properly conducted by an agent of the Bureau of Internal Revenue. And the agent's petition to the District Court, to which we may look in determining the nature of the proceeding, invoked judicial assistance solely in obtaining petitioner's testimony. Authority of the court was sought to buttress the procedure for collection of taxes and not in vindication of the public justice, as in criminal cases. The judgment of contempt was civil."

In *Lamb* v. *Cramer,* 285 U. S. 217, the Court was again concerned with whether a contempt was civil or criminal. In that case the defendant was held in contempt for failing to make restitution of certain property to a receiver, as directed by a court order. Speaking for the Court, Mr. Justice Stone said:

"To the extent that this purpose might be effected by process against Lamb for contempt, the proceeding was remedial, to aid in giving to the plaintiffs the property which, as against the defendants in the principal suit, they were entitled to receive. It is the purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is civil or criminal contempt. Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified exclusively as one or the other, still, under the allegations and prayer of the petition, it would have been competent for the District Court to punish the contempt by its coercive order until Lamb made restitution of the property, or im-

pose a fine payable to the receiver, compensating for its taking. A proceeding to secure such relief is civil in nature."

In his remarks during the argument below, Judge Sugarman suggested that the same acts could constitute both civil and criminal contempt. As to this, the decision of the Circuit Court of Appeals in *Merchants Stock Co.* v. *Board of Trade,* 187 Fed. 398, is significantly applicable. It was there held:

> "In every civil as well as in every criminal contempt there necessarily inheres an affront to the dignity and defiance of the power of the court and a liability to punishment therefor. The liability to punishment for an affront to the dignity of the court cannot, therefor, distinguish a civil from a criminal contempt, for it always exists in each. Yet every contempt is either a civil contempt or a criminal contempt. What, then, is the distinguishing characteristic between them? It is the dominating object of the prosecution and the party chiefly interested therein. If the chief purpose of the proceeding for contempt is to enforce the rights and administer the remedies to which courts have adjudged or may adjudge a private party to be entitled, and if such a private party is the one chiefly interested in it, the proceeding is for a civil contempt."

Certainly the dominating object of the contempt proceedings here was to coerce the petitioner into coming to New York to testify for the Commission pursuant to its subpoena. This was, as Judge Sugarman put it, the "end result desired". Thus, the contempt proceedings were civil in character, and the authority of the District Court to proceed with them terminated with the end of the injunction.

Other authoritative decisions which have held that acts similar to those charged to petitioner are civil rather than

criminal contempts include *Oriel* v. *Russell*, 278 U. S. 358; *Parker* v. *United States*, 153 F. (2d) 66; *Walling* v. *Crane*, 158 F. (2d) 80; and *United States* v. *International Union*, 190 F. (2d) 865.

In *Harris* v. *Texas & Pacific Railway Company*, 196 F. (2d) 88, the Court of Appeals for the Seventh Circuit considered a situation almost identical with that in the case at bar.

In that case, an employee of the Railroad Retirement Board refused to comply with a subpoena of the United States District Court for the Northern District of Illinois calling for the production of certain records in a civil suit. She was held in contempt and committed to custody, but released on bail. Thereafter, the case in which her testimony was required came to judgment, and the judgment was paid by the railroad.

The Court of Appeals vacated the contempt order and quashed the subpoena. Speaking for the Court, Judge Duffy said:

> "It is clear that the contempt involved in non-compliance with the order was civil contempt. The courts have consistently ruled that civil contempt proceedings are abated by a termination of the proceedings out of which they arose."

Likewise, in *DeParcq* v. *United States District Court*, 235 F. (2d) 692, the Court of Appeals for the Eighth Circuit, on application for a writ of prohibition by one who had been held in contempt for failing to respond to an order to show cause, held that judgment in the main action rendered the contempt proceedings moot and abated them. Judge Gardner said for the Court:

> "This is on the assumption that the alleged contempt was a civil contempt. It embodies the elements which characterize it as civil contempt rather than criminal contempt. The teaching of the *Gompers* case is to the

> effect that refusal to do an act commanded is civil contempt while doing a forbidden act is criminal contempt. * * * The contempt proceeding was a part of the action between Dean and the Chicago and Great Western Railway Company, and the termination of that action automatically renders the contempt proceeding moot."

The contempt proceedings here were initiated solely for the purpose of forcing and coercing petitioner to leave Havana and come to New York to testify in the action brought by the Commission, regardless of his medical situation. Necessarily, any contempt of court resulting from his non-compliance with the subpoena was a civil contempt. Under the law, with the entry of judgment against Reldan Trading Corp. and Cohen on November 18, 1957, the contempt proceedings likewise abated, and the court was without jurisdiction or power to continue with them or to issue a warrant for the arrest of petitioner.

2. The District Court erred in ruling that the decision of the Supreme Court in *Yates* v. *United States* (decided November 25, 1957) altered the law so as to authorize the continuance of the contempt proceedings against petitioner.

When the order to show cause why the warrant for petitioner's arrest should not be vacated came on for argument in the District Court on December 2, 1957, Judge Sugarman stated that he recognized that the decision of the Supreme Court in the *Gompers* case was the controlling authority and had significance "until November 25, 1957, when the United States Supreme Court handed down the decision in *Yates* v. *United States of America*". (Transcript, December 2, 1957, p. 52; Appendix B hereto, *infra*, pp. 99, 100.) At page 53 of the transcript, Judge Sugarman said:

> "So that while I agree with you that *Gompers* holds that Reldan and Cohen having taken the action that

they did, and Mr. Birrell could no longer be imprisoned to coerce evidence in the trial that never could be held, there still survives the power in the court, however, to imprison him if it sees justice in so doing for his having flouted the subpoena. Now, that is the only purpose of the continuation of this proceeding, for Mr. Birrell to come here and for us to determine whether he deliberately or otherwise flouted the subpoena that required him to be here on October 7th, and that power is distinctly recognized in this case of *Yates* v. *The United States of America.*"

It is respectfully submitted that Judge Sugarman was mistaken in his understanding of the decision of the Court in the *Yates* case, and that that decision provides no basis for his continuing the contempt proceedings previously instituted directing the issuance of a warrant after the termination of the main case.

In the *Yates* case, Mrs. Yates and thirteen co-defendants were indicted and convicted of conspiracy to violate the Smith Act. Alone of all the defendants, Mrs. Yates voluntarily took the stand and testified in her own defense. On cross examination on June 26, 1952, she refused to answer four questions about the Communist membership of a non-defendant and of a co-defendant who had rested his case. The District Court then adjudged her guilty of civil contempt for refusing to answer these questions, and committed her to jail until she should purge herself by answering the questions or until further order of the court. She was confined until August 30, 1952, when she was released on bail pending appeal of the conviction in the principal case. She was reconfined under the June 26 civil contempt order on September 4, 1952. An appeal was taken from the order directing her reconfinement, and she was again released on bail pending that appeal.

The Court of Appeals for the Ninth Circuit reversed the order reconfining her for civil contempt in *Yates* v. *United States*, 227 F. (2d) 844. Judge Fee, who wrote the decision of reversal for the Court of Appeals, said:

> "Coercion was the entire objective of these contempt proceedings. * * * Her attitude was contemptuous and defiant. But, after the end of the trial, it was error to attempt to coerce this witness into testifying before a jury which had been disbanded and could *not* be legally recalled."

This decision, of course, was *not* involved in and was *not* affected by the decision of the Court handed down on November 25, 1957.

As has been noted, when Mrs. Yates appealed from the order reconfining her on the basis of the above contempt proceedings, she was released on bail pending appeal on September 6, 1952.

Two days later, the District Judge adjudged her *in criminal contempt of court* for her refusal on June 26 to answer the same questions which had been the subject of the civil contempt proceedings. That same day, the Court again confined her on such finding of criminal contempt. She was released on bail pending appeal. *This conviction was also reversed* by the Court of Appeals in *Yates* v. *United States*, 227 F. (2d) 848. Judge Fee, who also wrote the opinion of the Court of Appeals in this case, said:

> "The purpose of the judge in the first commitment is not clear. * * * While coercion is applied, the defendant in the criminal case is entitled to know he may yet be subjected to a definite penalty for contempt and that the coercive restraint is not intended to relieve him of the punishment for the criminal refusals which he has already uttered.

> In any event, the intellectual confusion noted prevents us from denominating the two periods of custody under two different judgments for the same four refusals as double jeopardy for the same acts. If then the record had shown a definite notification to defendant at an appropriate time, the coercive and punitive sentences might have been successfully applied. *But the concept of due process of law is an additional safeguard. The notions inherent therein will not permit, without prior positive notification, what might be otherwise viewed the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then, when imprisonment has had no effect, the punishment of the refusal of obedience by incarceration for a term of years.*"

Nor was such decision of the Court of Appeals involved in the decision of this Court upon which Judge Sugarman relied.

Thus, in the two contempt aspects of the *Yates* case which were not affected by the Court decision, the only questions at issue here were disposed of. It was held that the District Court might not continue civil contempt proceedings after the termination of the principal case, and that it might not even continue criminal contempt proceedings at such time when such criminal contempt proceedings were based on the *identical acts* which were the basis of the civil contempt proceedings. Where the defendant is given to understand, as he was in the case at bar, that the purpose of the contempt proceedings is coercive and that such proceedings are intended to have the end result of coercing the defendant's testimony, the court is without jurisdiction and authority, after the termination of the main case and the abatement of civil contempt, to proceed in criminal contempt for the same identical acts.

After Mrs. Yates had taken an appeal from the judgment of criminal contempt which was subsequently reversed by the Court of Appeals in *Yates* v. *United States*, 227 F. (2d) 848, the District Court commenced a *third* contempt proceeding against her. It is this third contempt proceeding, and no other, which was before this Court, and it is only this third proceeding which was affected by this Court's decision.

This third proceeding was a criminal contempt proceeding. It was not based upon Mrs. Yates' four refusals on June 26 which were the sole basis of the civil contempt proceeding and the criminal contempt proceeding, both of which were reversed and have been discussed above.

On June 30, 1952 (four days after the occurrence of the acts which afforded the basis of the first two contempt proceedings), Mrs. Yates *again* refused to answer eleven questions which, in one way or another, called for her to identify nine other persons as Communists. Her ground of refusal was her belief that either the person named or his family could be hurt by such testimony. It was these refusals on June 30, 1952 (none of which were involved in the civil contempt proceedings or the prior criminal contempt proceedings) on the basis of which the District Court held her to be in criminal contempt, and imposed eleven concurrent sentences of one year each. It was this action of the District Court which, alone, was the subject of this Court's decision. Mr. Justice Clark, speaking for a majority of the Court, held that the refusals in question constituted contempt, and that the Court's power to punish such contempt criminally was unaffected by the prior contempt proceedings which were based on entirely different acts, but that the eleven refusals on June 30, 1952 must be treated as a single contempt. The Court nevertheless vacated the sentence on that conviction and remanded the case to the District

Court because of the necessity "of the trial judge reconsidering the sentence in the cool reflection of subsequent events."

It should be noted that the Chief Justice, Mr. Justice Douglas, and Mr. Justice Black, dissented from the majority opinion, and felt that the conviction in even this third contempt proceeding should be reversed. In the dissenting opinion, Mr. Justice Douglas said: "What the Court does now is to make the present conviction do service for the invalid conviction for her *first* refusal to testify. This cannot be done unless we are to make a rule to fit this case only."

It seems plain that the District Court was mistaken in construing the decision in *Yates* v. *United States* as affecting the case at bar.

3. The proceedings in the District Court did not comply with the requirements of due process of law, and so deprived petitioner of his constitutional rights under the Fifth Amendment to the Constitution.

It can scarcely be contended that proceedings have been conducted with due process of law within the requirements of the Constitution where

(a) Contempt of court proceedings are initiated, and the issuance of a warrant of arrest is requested, for the purpose of withdrawing passport facilities theretofore made available to an American citizen, and otherwise coercing and compelling him to testify in an action in which he is a defendant charged with committing an offense against the United States (Appendix B hereto, *infra*, pp. 87-88);

(b) The Securities and Exchange Commission obtains a court subpoena requiring counsel for a defendant to appear to testify against his client in contempt of court

proceedings, and such counsel is required to appear (Appendix B hereto, *infra*, pp. 60, 70);

(c) A United States District Judge uses the device of announcing that a trial has commenced for the sole purpose of retaining jurisdiction over persons who have been subpoenaed for a future period of four months, when in fact the trial has not commenced and cannot commence for more than four months thereafter (Appendix B hereto, *infra*, pp. 50-52);

(d) Subpoenas calling for the appearance of witnesses to testify at a trial on a date certain are issued and served when counsel for the Securities and Exchange Commission is aware that the trial cannot and will not commence on the return date of the subpoenas (Appendix B hereto, *infra*, pp. 51-52, 54);

(e) Information relative to the question of guilt of a defendant in contempt proceedings is communicated to the judge by counsel for the Securities and Exchange Commission on an ex parte basis, not on the record, and not in the presence of counsel for the defendant (Appendix B hereto, *infra*, pp. 127-8);

(f) Counsel for the Securities and Exchange Commission, having in his possession a medical certificate attesting to the illness of a proposed defendant in contempt proceedings for failure to respond to a court subpoena, fails to make reference to such medical certificate in the application for an order to show cause to initiate such contempt proceedings (Appendix B hereto; *infra*, pp. 61-62);

(g) Contempt of court proceedings, by their nature and purpose civil in character, are continued after the main action has terminated, and the jurisdiction of the court has abated;

(h) A warrant for the arrest of petitioner is issued "for the reason that he wilfully failed to appear after having

been served with a subpoena to appear at the trial of the case of *Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*, on the 7th day of October, 1957, and thereafter having failed to respond personally to an Order to Show Cause, duly issued on the 11th day of October, 1957", when no hearing was held on the issue of whether petitioner did wilfully fail to appear at such trial, and when the order to show cause initiating such proceeding required that personal service thereof be made on petitioner, and no service was ever effected on petitioner (Appendix B hereto, *infra*, pp. 126, 110, 66);

(i) When papers in connection with such contempt proceedings were subscribed by the attorney for the Securities and Exchange Commission as "attorney for Judge Sugarman", and thereafter Judge Sugarman heard and decided motions in such proceedings;

(j) The United States Court of Appeals denied an application for a writ of prohibition and mandamus from the bench without an examination of the briefs submitted, and for the stated reason that it wished to discourage the making of applications for writs of prohibition.

Surely the occurrence of such acts in the course of an action in the courts of the United States lacks the due process of law prescribed by the Constitution of the United States, and the decisions of this Court thereunder.

4. This Court has jurisdiction to issue writs of prohibition and mandamus to a United States District Court in a proper case where such relief has been sought from and denied by a United States Court of Appeals, and where, as here, such writs are sought for the purpose of confining the District Court to an exercise of its prescribed jurisdiction.

United States Alkali Association v. *United States*, 325 U. S. 196, 202;
Bankers Life Co. v. *Holland*, 346 U. S. 379, 382-3;

Ex Parte Peru, 318 U. S. 578, 583-5;
De Beers Mines v. *United States,* 325 U. S. 212;
Los Angeles Brush Co. v. *James,* 272 U. S. 701, 706;
McCullough v. *Cosgrave,* 309 U. S. 634.

While it is recognized that the Court will exercise such jurisdiction, and will issue such a writ only in exceptional circumstances, it is submitted that exceptional circumstances exist here which require the exercise of such jurisdiction by the Court.

The avowed purpose for which the contempt or court proceedings were initiated, and the issuance of the warrant of arrest sought, was to afford a basis for the withdrawal of the passport facilities previously made available to petitioner by the State Department, and so to compel petitioner to return to New York and give testimony for the Commission with respect to an offense against the United States in which it was alleged that he was the principal offender.

It has been held that, under the due process clause of the Constitution, the government may not arbitrarily restrain the liberty of a citizen to travel abroad. *Schachtman* v. *Dulles,* 225 F. (2d) 938. In the same case it was held that the right to travel, to go from place to place as means of transportation permit, is a natural right, subject to rights of others and to reasonable regulation under law, and a restraint imposed by the government of the United States upon this liberty must conform with the due process clause of the Constitution. See also, *Boudin* v. *Dulles,* 136 F. Supp. 218, where it was held that a citizen from whom passport facilities were withheld was entitled to have all the evidence upon which the passport office might rely appear upon the record so that he would have the opportunity to refute it.

Not only has petitioner not had made available to him all of the evidence presented to the passport office, but he

has not even had available to him all of the evidence presented to the United States District Court in these proceedings aimed at effecting a withdrawal of passport facilities from him.

If the Court should deny this petition for writs of prohibition and mandamus, the withdrawal of passport facilities from petitioner will become an accomplished fact, and petitioner will suffer irreparable damage and prejudice.

It is an exceptional circumstance for the massive powers of a government to be marshalled, as they have been here, against one who, because of serious illness, has been unable to respond to a subpoena calling for him to appear as a witness in an action which has now been terminated. It is appropriate for this Court, as the jealous guardian of the liberties of the individual citizen against oppressive actions of the government, to exercise its authority and issue writs of prohibition and mandamus in this case.

CONCLUSION

For the foregoing reason, this petition for a writ of prohibition and a writ of mandamus should be granted.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioner.

Appendix A.

TITLE 28, UNITED STATES CODE, SEC. 1651: WRITS:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, §§ 90, 63 Stat. 102.

TITLE 18, UNITED STATES CODE, SECTION 401: POWER OF COURT:

A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

SEC. 402: CONTEMPTS CONSTITUTING CRIMES:

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under

the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title, and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in the case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. June 25, 1948, c. 645, 62 Stat. 701, amended May 24, 1949, c. 139, Sec. 8(c), 63 Stat. 90.

RULE 45. FEDERAL RULES OF CIVIL PROCEDURE:

(f) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

RULE 42. FEDERAL RULES OF CRIMINAL PROCEDURE:

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. SWAN-FINCH OIL CORPORATION *et al.*, Defendants.	Before: HON. SIDNEY SUGARMAN, District Judge. Civ. 119-232 119-301

Stenographer's Minutes.

June 4, 1957

p. 262

The Court: All right now. Is it agreeable that we reconvene the pretrial on Monday, June 24th?

Mr. Schenker: That is one day I can't be here, your Honor. I have to be in Boston on a board of directors meeting.

The Court: I don't know what is going to happen to me in the meantime. I am supposed to be trying jury cases. Is the 25th agreeable for a date to reconvene to continue pretrial?

Mr. Devaney: Yes.

The Court: Well, unless you hear from me to the contrary by virtue of whatever trials I may get into, we have a firm date in this room for 10:30 on June 25th to continue pretrial.

pp. 277, 278

The Court: Now the question is assuming that we can finish our pretrial conferences by the end of the week of June 25th, that brings us then to the end of the June term

and it brings me into my engagements for the month of July, which I have already indicated to you, so we are left with the proposal now of either resuming in August or resuming in October.

I think the defendants have spelled out a very strong basis for their application that they have the months of August and September to not only prepare their facts, but also to prepare the memoranda which were suggested, which I think should be available to the Court shortly after Labor Day. That would give you from now through the month of August to prepare on both sides, and on that basis I think you should be in a position to proceed, everybody should be in a position to proceed, with your deposition techniques concluded, by the opening of the October Term, which, being the first Monday in October, I assume will be October 7th.

The Jewish holidays will be behind us if we do start on October 7th.

We will continue our pretrial on June 25th, and we will continue on it until we hammer out a pretrial order, if it takes us one, two or three days, if necessary; that briefs will be exchanged and filed by October 6th; and that we proceed to trial on October 7th; and that if either side feels itself aggrieved by harassment, depression or hardship in the deposition process, that a motion be made for relief.

June 10, 1957

pp. 4-9

The Court: My purpose in convening this morning is to mark as commenced the trial for the permanent injunction still pending against the named defendants in the case of the Securities and Exchange Commission vs. Swan-Finch Oil Corporation et al., and upon the consent of all parties, except Reldan and Cohen, to continue or adjourn the trial for the permanent injunction until 10:30 on October 7, 1957.

Appendix B.

All persons under subpoena, whether here in person, represented by counsel, or who chose not to appear in answer to the subpoenas returnable today, are directed that those subpoenas prevail with full force and effect as though they originally required the witness therein subpoenaed to, appear on October 7, 1957, at 10:30 A. M. in the United States Court House, at whatever room I will then be assigned.

In the interim, we will proceed further with the pretrial conference on June 25th, at which time we will try from day to day, until concluded, to evolve the pretrial orders, a pretrial order, and counsel who have engaged in the pretrial technique thus far have received, I believe, the Court's draft of what will ultimately become, as far as we have gone, item 7 in the pretrial order. We will continue on June 25th and thereafter with the admission of other documents, either in toto or to limited extent, the resolution of issues and any of the other appropriate matters set forth in Rule 16 of the general rules of this Court with respect to the form of a pretrial order.

Now, is there anything to engage the Court's attention before we adjourn the trial proper until October 7th? If not, the Securities and Exchange Commission is directed to write every one of the persons subpoenaed by registered mail, return receipt requested, whether here today or not, and file with the Court copies of its letters, advising those parties that the Court ordered on this day that all persons under subpoena present themselves for the trial on October 7, 1957.

Mr. Devaney: That will be complied with, your Honor.

The Court: One other thing. The Securities and Exchange Commission, in addition to writing Lowell M. Birrell, will send registered return receipt requested to the attorneys who have appeared for Birrell in this proceeding and confessed judgment, a copy of the letter sent to Birrell.

Appendix B.

October 7, 1957

pp. 324-326

The Court: Now then, as I take it, we are going to continue on our pretrial conference.

Mr. Devaney: That is my understanding.

The Court: How much remains to be done on that timewise? Have you any idea?

Mr. Golenbock: Your Honor, we are in a somewhat unfortunate position to determine the time aspect of this, although a lot of time has passed since we met in June. We did not get the proposed stipulation of facts from the Securities and Exchange Commission until late Wednesday afternoon of last week, and we have not had time to sit down with the representatives of the Securities and Exchange Commission.

The Court: Do you want to take a recess of this pretrial to permit that, and I will start the other case?

Mr. Devaney: Well, your Honor, may I say this as a matter of preliminary here: we are going to have to present proof through witnesses to your Honor in this matter. As you recall, when the Court convened we had a subpoena addressed to Lowell M. Birrell. Mr. Birrell did not make his appearance. At that time the Court directed us to write a letter by registered mail to Mr. Birrell, together with a copy to his counsel. In the pressure of things we felt that one of the things to do was to re-serve Mr. Birrell with a new subpoena for his appearance. We re-served Mr. Birrell last Friday afternoon at quarter to five with a subpoena calling for his appearance here this morning. I don't see Mr. Birrell in the courtroom. I don't know where he is. As I say, he is an important witness to our case. I would suggest your Honor issue a bench warrant or do something else to ensure his appearance here.

The Court: Well, I will have to consult the rules on that. I have never been confronted with the problem of a recalcitrant witness or one who doesn't appear; so I don't frankly know.

pp. 335-336

The Court: Mr. Birrell's secretary has indicated to Mr. Benson over the telephone that Mr. Birrell is out of the city. I would suggest that if time permits, because we are not actually going to trial here for probably a week, that you try to communicate with him the next day or two by telephone and see what arrangements you can make that will positively assure his presence. If you are not completely satisfied that you can make such arrangements, then I would like instructions from you on what powers I have under the circumstances and what application you are prepared to make.

October 10, 1957

pp. 345-352

The Court: The Birrell situation, while collateral to our problem, of the trial of this suit, nevertheless has an impact upon it because I understand your representation to be, Mr. Devaney, that you cannot proceed unless Mr. Birrell is a witness.

Mr. Devaney: That is right, your Honor. As your Honor well knows from all that has transpired in the past, Mr. Birrell is the dominant figure in this whole picture and we must have his testimony from the witness stand.

The Court: What do you propose to do? Have you given any thought to it?

Mr. Devaney: Yes, your Honor, we have attorneys on the staff researching the question and it appears from the brief report I had yesterday afternoon that your Honor has the authority to issue an arrest warrant for Mr. Birrell upon his failure to appear here.

Appendix B.

The Court: While your people may come up with something that would indicate that I have that authority, I would be hesitant to exercise it, because I am not too sure I have it. I don't know if your investigators have run across an article in 17 Federal Rules Decisions which constitutes a report by a sub-committee of the Junior Bar of the California Bar Association on Civil and Criminal Contempts in the Federal Courts. That is a most informative article and after you read it I think you will come up with the conclusions that I at least as of this moment have arrived at, and those conclusions are these:

That the contempt if any by Mr. Birrell, assuming valid service of the subpoena, and, parenthetically, under that section that I conveyed to you through Mr. Benson over the phone no fee is necessary, because an agency of the United States is involved, that assuming a valid service of the subpoena, the contempt in ignoring that subpoena would be a criminal contempt under the last subdivision of Title 18, Section 401; that it be a criminal contempt of a constructive nature rather than a direct criminal contempt in the presence or the hearing of the Court. It is governed by Federal Rule of Criminal Procedure 42(b), I believe, as to the procedure of bringing the contempt before the Court.

I believe if you read 42(b) of the Rules of Criminal Procedure, you will find that it has to be brought on in a certain way by certain notice with a clear exposition of the fact that it is a criminal contempt, and it can carry with it certain penal results.

Now, I feel the better practice would be for an order to show cause to issue, and I have not researched it, but I have the notion that that order to show cause could be served anywhere, at least within the territorial United States; that an order to show cause why he should not be punished be the first document, and then I feel that he

should be given the opportunity of coming in and making himself right with the Court.

However, then, if he ignores that, as he has ignored the subpoena, then I believe the Court in order to preserve its own dignity and authority would have no recourse but to issue a warrant for his arrest. However, I don't think, particularly in the light of Mr. Wels' statement in Court's Exhibit 1 at pretrial, that Mr. Birrell is suffering from nervous exhaustion and under the care of doctors. In the light of that statement and on the basis that there may be some truth in it—and I emphasize the word "may"—I feel that it would be untoward for the Court to immediately issue a warrant for his arrest.

I think he should be given an opportunity by means of a show cause order.

The clerk has been good enough to put before me Rule 42, and it might be worth taking a few moments to analyze it. Subdivision (a) of Rule 42 has to do with summary disposition and I believe that that is the provision that applies in cases where there is a contempt in the presence of the Court or so near the Court that it interferes with court business.

This contempt that we are dealing with, if it is a contempt, and if it was deliberately done, is a criminal contempt of a constructive rather than a direct nature, and would fall under that last subdivision of 18 U. S. Code, Section 401, which enunciates that it is a contempt to wilfully disobey a mandate or process or order or writ, et cetera, of a Court; a lawful order of the Court.

Rule 42(b) reads as follows:

> "A criminal contempt except as provided in subdivision (a) of this rule"—

and that is the direct contempt—

> "shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reason-

able time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the Court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in case in which an act of Congress so provides."

I believe he is not entitled to a trial by jury in this case because I believe that section—it is in the 3600a of either Title 18 or Title 28—it escapes me at the moment. Incidentally, I think it is 3691, and it is set forth in that article in 17 Federal Rules Decisions; and because of the fact that this is a suit, in my view, brought on behalf of the United States, he would not be entitled to a jury trial.

I am reading again and repeating in part:

"The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment."

Now while I recognize that the cryptic language appears in Rule 42(b) that I may order his arrest, I think that while it might not be an abuse of discretion, it certainly would be a highhanded process for me to resort to an order of arrest without first availing ourselves of the order to show cause which as an alternative, a prior alternative, appears in the rules.

Appendix B.

I am content to accept the statement of Mr. Devaney of the SEC, that as counsel they cannot proceed without Mr. Birrell. I, of course, have no means of knowing otherwise. You know your case and you are entitled to present your case as you see fit.

Under the circumstances, that is going to wreak havoc with the program that we set out, and it appears to me that we ought to get this business of getting Birrell in before we proceed with anything further, unless you can suggest an alternative.

Mr. Devaney: Your Honor, may I say this: That as I understand the rules of the Southern District, counsel for the Commission can represent the Court and present to the Court its application for an order to show cause as to why Mr. Birrell should not be adjudged in criminal contempt.

The Court: If there is any doubt about it, under Rule 42(b), I am now appointing you for that purpose.

Mr. Devaney: I would like that authority. I think then that the next step for us to do, that is, speaking on behalf of the Commission—and it is foolish for me to attempt to present the case here without Mr. Birrell—is for me to present to your Honor the application for the order to show cause supported by affidavits of what has happened here; then attempt to have the order to show cause served upon Mr. Birrell to allow him to stay in court, so to speak, in order that he may satisfactorily explain to your Honor why he is not here and the reason for it, or whether he is in wilful disobedience of a lawfully issued subpoena.

Mr. Golenbock: Your Honor, the developments this morning here come somewhat as a surprise to me. I have never heard before that the Securities and Exchange Commission would be unable to present its case without the presence of Lowell Birrell.

Appendix B.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. CR 154-351

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL

To Richard H. Wels, Esq.
551 Fifth Avenue
New York 17, N. Y.

You are hereby commanded to appear in the United States District Court for the Southern District of New York at Foley Square, Court Room 705 in the city of New York on the 1st day of November 1957 at 10:30 o'clock A.M. to testify in the above-entitled case.

This subpoena is issued on application of the [1] United States.

October 23, 1957.

HERBERT A. CHARLSON,

By ....., Clerk.

By ....., Deputy Clerk.

October 23, 1957. (SEAL)

JOHN J. DEVANEY, JR.
Attorney for United States

.....
Address 225 Broadway
New York 7, N. Y.

[1] Insert "United States," or "defendant" as the case may be.

Appendix B.

, October 24, 1957

John J. Devaney, Esq
Securities and Exchange Commission
225 Broadway
New York, N. Y.

Re: UNITED STATES OF AMERICA
vs. LOWELL M. BIRRELL

Dear Mr. Devaney:

As you know, pursuant to the inquiries which have been sent to me by you at the direction of Judge Sugarman, I have attempted to cooperate with you and with the court in establishing facts with reference to Mr. Birrell's departure for Havana on October 4, 1957 and as to whether he had in fact made arrangements to go to Havana prior to being served with a subpoena of the United States District Court at LaGuardia Airport late in the afternoon of that day.

I have ascertained that Miss Susan Miller, who is employed in a secretarial capacity at Doeskin Products, Inc. and renders secretarial service to Mr. Birrell, in fact had made the arrangements for Mr. Birrell's transportation to Havana, pursuant to telephone instructions which she received that day from Mr. Birrell in Montreal.

Miss Miller has set forth the facts of the occurrences of that day in an affidavit executed by her. I enclose Miss Miller's affidavit on the understanding that this will be submitted to Judge Sugarman on or before November 1, 1957 and that it be made a part of the record of these proceedings.

You will recall that on October 11, 1957 at about 9:30 A. M. when I was at the office of the Commission engaged in another matter, I delivered to you a certificate from

a physician in Havana with respect to the medical care which Mr. Birrell was receiving, and which had been delivered to me that morning for transmittal to the Court. I note that no reference to that medical certificate appeared in the papers in which an order to show cause was signed at 4:45 that afternoon.

As you are aware, such medical certificate gave the address of Mr. Birrell's apartment in Havana. I feel that such medical certificate and the letter of transmittal should likewise be made a part of the record of these proceedings.

As I have informed you heretofore, so far as I know, Mr. Birrell has been in Havana continuously since that time, either at the apartment, the address of which is noted in the medical certificate which I delivered to you on October 11, or at the Sacred Heart Hospital in Havana where he has been undergoing extended medical care.

I was served with a subpoena this morning to appear in the United States District Court on November 1 in connection with this matter. As I told you when I talked with you on the telephone when the U. S. Marshal was at my office, I very much resent the fact that you felt it necessary to make service of a subpoena upon me. I am not in the habit of avoiding any request which may be made of me by any Court of Judge, and the service of the subpoena upon me was not necessary to insure my presence in Court on November 1.

I have had occasion to examine the transcript of the pretrial proceedings. I have noted therein what was certainly a suggestion on your part that, prior to the commencement of the court proceedings against Swan-Finch and Doeskin, Mr. Birrell had declined to testify before the Commission and had refused to appear there. I think the record certainly should be corrected in this record because it just is not so.

Appendix B.

The Commission's orders of investigation were not issued until March 17, 1957. Sometime thereafter, I became advised of this and examined the orders in your office. At that time I inquired of you whether you wished to examine Mr. Birrell, and you told me you felt it would be premature to question Mr. Birrell at that time, but that you would let me know when you wished to do so. I might say that over the years there have been a number of other proceedings before the Commission in which the Commission wished to have the benefit of Mr. Birrell's testimony, and I know as a matter of first-hand knowledge that he appeared at your offices and testified fully and extensively.

Actually it was not until April 8, 1957 that you informed me the time had come when you wished to examine Mr. Birrell. I told you at that time that I was leaving for Ft. Worth, Texas to attend the meetings of the Board of Directors of the Bowling Proprietors Association of America, Inc., a national trade organization of which I have been General Counsel for some years and at whose meetings I am required to be present. The spring meetings are of particular importance because they are held in conjunction with the meetings of the Board of Directors and Membership of the American Bowling Congress. I told you I could probably push things and get back on Friday morning and arrange to bring in Mr. Birrell for questioning on Friday afternoon. However, you said that would not be necessary but that the following Monday would do, and we left it that I was to call you on Monday morning. When I got in to the office on Monday morning April 15, I telephoned Mr. Birrell to make sure he was available and ready to come in with me that morning to your office at the SEC for questioning. I ascertained that this was the fact and telephoned you to find out what time would suit your convenience. I was told that you were

in court and would telephone me upon your return. You did call me later that morning and informed me that you had been in court to file the Commission's complaint in in the Swan-Finch and Doeskin actions, and to obtain the signature to the Order to Show Case. You said that since the matter was now in the hands of the Court, instead of in the hands of the Commission, there was no longer any necessity for Mr. Birrell to appear at the Commission, and that it would not be necessary to keep the appointment which was had with you for that day. These facts are, of course, set forth in the affidavit of Mr. Birrell filed with this Court in opposition to the Commission's application for a preliminary injunction.

This is the complete fact with respect to Mr. Birrell's availability to testify prior to the commencement of the actions in Court.

Yours very truly,

RICHARD H. WELS

RHW/H—Enclosure
CC—Judge Sidney Sugarman

Appendix B.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

C. 154-351

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOWELL M. BIRRELL,

Defendant.

Before: HON. SIDNEY SUGARMAN, D. J.

New York, November 1, 1957;
10:30 o'clock a.m.

APPEARANCES:

PAUL WINDELS, JR., Esq., Attorney for Securities and Exchange Commission; Paul Windels, Jr., Esq., John J. Devaney, Jr., Esq., and Miss Eileen E. Evers, of Counsel.

Moss & WELS, Esqs., Attorneys for Defendant; Richard H. Wels, Esq., of Counsel.

The Clerk: United States of America vs. Lowell M. Birrell. Are you ready, gentlemen?

Mr. Devaney: Yes, we are ready.

The Court: All right.

Mr. Devamey: If it please the Court, on October 11th an order to show cause why Lowell M. Birrell as a de-

fendant should not be punished for criminal contempt was signed by your Honor.

At that time your Honor, in his order to show cause, directed the United States Marshal to serve Mr. Birrell personally with a copy of this order to show cause, together with the papers on which it was granted, and also directed counsel to mail a copy of the order and the papers upon which it was granted to Richard H. Wels, Esq., 551 Fifth Avenue, and to Lowell M. Birrell at his address in Havana, Cuba, and at Doeskin Products, Inc., here in New York City.

I would like to submit at this time, your Honor, an affidavit by an employee of the Securities and Exchange Commission in which he relates the mailing of these packages. We have return receipts for two of the packages mailed, the one to Mr. Wels and the other to Doeskin Products. We have no return from the packages mailed to Havana, Cuba.

We have asked our Post Office Department to check with the Cuban authorities to determine what if anything has happened to that package. From the last report last night we were unable to get an answer from Cuba.

I checked with the United States Marshal and he advised me that he has been unable to effect service upon Mr. Birrell and has so returned the papers to the clerk of the court.

As your Honor will recall, at the time we presented this application for the order to show cause we advised your Honor that we had information that Mr. Birrell was in Havana, Cuba, and that he was under the care of a doctor.

We showed your Honor a copy of a medical certificate written in Spanish by a Dr. Usategui which was submitted to me by Mr. Wels, who informed me that it had been slipped under his door and he brought it down—he sent it down to the Commission by letter.

Appendix B.

After we had mailed the order to show cause to Cuba we enlisted the aid of our State Department through our consular service in Cuba for whatever information they could furnish us with respect to Mr. Birrell, his condition, et cetera.

The first answer that I received—with your Honor's permission I would like to read a telegram that is dated October 25, addressed to John Devaney, U. S. Securities and Exchange Commission, 225 Broadway, signed "American Consul."

> "Embassy understands Lowell Birrell released Sacred Heart Hospital Habana recently still in Habana seen last few days by Cuban citizen Magin Benach associated with Birrell in operation local racetrack—Benach expects visit New York October 28th about ten days arriving via plane line unknown exact destination not given due to association Birrell and Beach not known if Latter would be cooperative in giving information."

Your Honor, I have a photostatic copy of this and I would like to have that made part of the record, if I may.

In response to this telegram, a telegram was sent by the Securities and Exchange Commission and forwarded to the American Consul, U. S. Embassy, Havana, Cuba, under date of October 28. With your Honor's permission I would like to read this telegram into the record.

> "American Consul U. S. Embassy, Havana, Cuba.
>
> "Re your tel 25 October Lowell Birrell—information helpful but need answers to the following:
>
> "1. When did Birrell arrive in Havana and by what method of transportation—reported to have left New York City on 5th October.
>
> "2. When did Birrell enter hospital and for what reason.

"3. When was Birrell released from hospital and what treatment was given him.

"4. Has Birrell been out of Cuba between 5th October and today.

"5. Present status of Birrell's health.

"Information urgently needed prompt response will be appreciated.

"U. S. Securities and Exchange Commission, New York, N. Y."

I have a copy of that, your Honor, and I would like to make that a part of the record.

In response to that telegram, your Honor, I received another telegram from the American Consul in Havana dated October 28, 1957, and I would like to read this into the record. It is addressed to John Devaney, U. S. Securities and Exchange Commission, 225 Broadway, New York.

"Your telegram October 28th Birrell arrived Cuba via Cubana Airlines October 5th hospitalized October 14th to 16th for biopsy negative results and health reportedly good re absence from Cuba Embassy endeavoring interview Birrell personally since to obtain such information independently involves delay.

"American Consul."

I have a copy of this telegram, your Honor, for the record.

After, your Honor, I received another telegram from the American Consul, Havana, Cuba. This telegram is dated October 30th, and, with your Honor's permission, I would like to read this into the record.

It is addressed to John Devaney, U. S. Securities and Exchange Commission, 225 Broadway, New York.

"Embassy telegram twenty-eight letter delivered personally Birrell's apartment afternoon October 28th

requesting he visit Embassy stop not home stop servant stated would return soon stop 10:30 a.m. today 30th Birrell telephoned Embassy acknowledging letter and claiming unable call personally stop claims constantly under care Dr. Usategui heart specialist who ordered him to bed for a week Sunday after arrival claims in Sacred Heart a few days for various tests including bipsy''—

I think he means biopsy.

The Court: Yes, biopsy.

Mr. Devaney: ''claims under doctor's orders remain in apartment and that he goes out only to visit doctor also to be on strict reducing diet also that intends talk with psychiatrist about quieting his nerves also that he does not know how long will be confined to his apartment stop states has not been out of Cuba since October 5th stop telephone is F-8485 stop says his lawyer Richard Wels New York can give any information needed stop foregoing does not agree with recent remark of Benach that Birrell had been in hospital only a few days and fortunately had nothing very bad also that Benach expected Birrell at his house for dinner that night.

''American Consul.''

I have a copy of that telegram, your Honor, for the record.

And, if it please your Honor, I also have been in touch with Mr. Wels, and Mr. Wels has submitted to me by a letter dated October 24, 1957, a copy of which was forwarded to you, an affidavit prepared by Susan Miller. This affidavit was executed on the 24th day of October, 1957, in which Miss Miller recites the travel arrangements for Mr. Birrell from New York City to Havana.

The Court: Yes, I read both of those affidavits.

Mr. Devaney: And may I make this a part of the record, your Honor?

The Court: In order that the record may be complete, I now inquire whether Lowell N. Birrell is present in this courtroom?

Mr. Wels: Your Honor—

The Court: Does anyone wish to be heard in his behalf?

Mr. Wels: Your Honor, my name is Richard H. Wels. I am here this morning under a subpoena of this court but I trust that I may have the indulgence of the Court to make a few remarks with respect to this matter.

The Court: Yes, of course.

Mr. Wels: May I say, your Honor, that immediately upon receiving the letter which Mr. Devaney sent me, I proceeded to make a number of inquiries and I have tried to make all the information available to Mr. Devaney and to the Court.

I have here for your Honor a certificate signed by Dr. Usategui on October 29, 1957, which reached me yesterday. It is in Spanish. I have a copy and a translation of it in English.

I would like to have the certificate and the English translation made a part of the record.

The Court: Yes.

Mr. Wels: I may read this so that Mr. Devaney will know what it says. I will give you a translation.

> "National Medical Association,
>
> "Medical Federation of Cuba,
>
> "Dr. Augusto Usategui Lezama, physician surgeon, domiciled at 302 O Street at 27th Street, Vedado, Havana, Cuba, member of the National Medical Association of Havana.
>
> "I certify that Mr. Birrell has been under my care since his arrival in Cuba on October 5, 1957. Owing to his state of exhaustion I prescribed a week of absolute rest. At the end of this week he was taken to Clinica El Sagrado Corazon for a thorough

investigation, including biopsis. He is under hypocaloric regimen in order to make him lose about 40 pounds and have new investigations made on him. He suffers from nervous exhaustion and mental depression. I prescribed psychiatrical treatment while under dietetic regimen. At the present time I am unable to determine the duration this treatment will require. In my opinion it is dangerous for Mr. Birrell's health to be active in business for at least the next 60 days. At the end of this period I shall be able to make a more accurate prognosis and determine the duration of his treatment.

"In witness of I sign the present certificate at Havana on October 29, 1957."

I would like to make that a part of the record.

Now, your Honor, I have—your Honor has received a copy and it has been made a part of the record, of the affidavit of Miss Susan Miller who made the travel arrangements.

The Court: Yes.

Mr. Wels: For Mr. Birrell. And may I emphasize that she made these travel arrangements on his instructions prior to the time that he was served with a subpoena.

Miss Miller is not under subpoena but she has come to the court voluntarily at my suggestion and at Mr. Birrell's suggestion to be here this morning in order to answer any questions that may be put to her. This is Miss Miller's birthday and she felt that this might be a good way to get some happy returns, and—

The Court: Let me interrupt. The Court has no purpose in asking her any questions. Would counsel for the SEC desire to ask her any questions?

Mr. Devaney: Not at this time, your Honor.

Mr. Wels: I may say, your Honor, that Mr. Devaney has told me that he wished to have Miss Miller here, and

for that reason I suggested to her that she come down and she is here voluntarily and I would like the record to show that.

Your Honor is familiar with Miss Miller's affidavit, having read it—

The Court: Yes.

Mr. Wels: In which reference is made to a taxidriver. I have here, your Honor, a further affidavit which I would like to read into the record.

"City and State of New York, County of Queens.

"Louis Schwartz, being duly sworn, deposes and says:

"I reside at 3063-12th Street, Astoria, New York. I am a taxicab driver employed by Main Operators of 2511-41st Avenue, New York City. I am a licensed taxicab driver.

"On October 4, 1957, at about 3:45 p.m. in Manhattan, my cab was hailed by Miss Susan Miller, who asked me to take her to LaGuardia Airport. On the way to the airport, Miss Miller explained that she was meeting her boss who was coming in from Canada and that he would have to get to the Newark Airport to make a 5:55 p.m. flight from Newark to Miami. Miss Miller asked me if I would make a deal on a flat rate basis to take her to LaGuardia, to wait at LaGuardia for the arrival of her boss, Mr. Lowell M. Birrell, and to drive then on to Newark to get the 5:55 flight. I agreed to do so.

"I drove Miss Miller to LaGuardia Airport and waited until Mr. Birrell's plane came in. The plane was about 15 minutes late. After the plane arrived, Miss Miller and her employer entered my cab and we drove to the Newark Airport.

"On our way to the Newark Airport, while we were going through 37th Street between Ninth and Tenth

Avenues in Manhattan, we had a slight accident. A truck pulled out into traffic and damaged the left door of my car. This created an additional delay while I exchanged information with the driver of the truck. After this accident occurred I asked my passengers for their names and addresses so that they might be available to verify my statement to the company and its insurance carrier as to the accident. At the same time, so that they would be able to answer inquiries which would be made of them, I gave them my name and address.

"Sworn to before me this 24th day of October, 1957 Jacob Robin."

I ask, your Honor, that this may be made part of the record.

Now, your Honor, the Commission has made a number of statements in supporting affidavits, two of which I think needs correction.

First, your Honor, you will recall that on June 10th the Court directed that the Commission send copies, send letters to Mr. Birrell and to me.

The affidavit in support of the order to show cause says that such letters were sent. I do not think it is of any significance but I think that the fact should be corrected, because no such letter was sent to me. I do, however, get the transcript on a daily basis. And I recall that some time thereafter Mr. Devaney indicated that I was going to get a letter from him and I wondered why no such letter was ever sent to me.

Secondly, your Honor, with respect to the—

The Court: Wouldn't you prefer to amend that and say that no such letter was ever received by you?

Mr. Wels: Yes, I would be very happy to say that.

The second matter which I think needs some correction is "the subpoena served on Mr. Birrell for his appearance

here on June 10th was issued on May 18th and that subpoena was served on June 4th."

Now, your Honor, we get on a daily basis copies—when I say "we" I refer to the companies which I represent and of which Mr. Birrell is chairman of the board of directors—we get on a daily basis the transcript of the testimony, of the pretrial hearing, and we usually receive it a day or so afterwards. On June 4th—this is the very day that the subpoena was served on Mr. Birrell, and at page 278 of the pretrial before your Honor, your Honor definitely said that it would be—we were not present because we had already on May 13th, I believe, consented to the entry of the injunction—but your Honor definitely said that the trial would not go on on June 10th, that the pretrial hearing, that the pretrial order, hammering out a stipulation, would resume on the 25th of June, and that the actual trial would begin on October 7th.

The subpoena that was served upon Mr. Birrell was to appear and testify on the trial on June 10th.

When that pretrial testimony came in, really the pretrial discussion, I suppose, I read it and I called Mr. Birrell's attention to it. And I pointed out to him that the trial would not be going on on June 10th but it would be going on on October 25th, and he discussed it with me—

The Court: October 25th?

Mr. Wels: October 7th, I am sorry. And he discussed with me at that point whether he would have to testify on June 10th.

I said, "Personally, I don't see any necessity for you being there in view of the fact that the pretrial would go on until June 25th."

I think that the record as to that fact should be cleared—

The Court: Before we get away from that, assuming that everything you say to be so, and I have no doubt that it is so, the fact of the matter is that despite the fact that

you advised Mr. Birrell that he would not be required to testify until October 7th, he did not appear on October 7th; despite the further fact that on October 4th or thereabouts he was served with a new subpoena to be here on October 7th, he did not appear. So regardless of what might have occurred prior to the hearing of June 10th, there is no doubt that he knew in one form or another that he was supposed to be here on October 7th and he was not here. Is that correct?

Mr. Wels: On the afternoon of October 4th, certainly until that time, nobody knew, and I think everybody was pretty much under the impression that there was going to be some form of a stipulation between the Commission and Reldan and that there wasn't going to be any trial.

I certainly, from reading the pretrial argument and discussion, was under the impression that there was a very strong likelihood that that was going to happen, that there might be no trial and that the trial date might be advanced, and if there was going to be a trial—

The Court: Let me inquire, Mr. Wels: were there any pretrial minutes between June 10th and October 7th?

Mr. Wels: Oh, yes, there were. I believe there was.

The Court: What dates?

Mr. Wels: I knew there were some.

The Court: Probably in June.

Mr. Wels: After June 10th, yes, sir.

The Court: Was there anything in the transcript of that record about any stipulation of settlement between Reldan and the Commission?

Mr. Wels: Well, I know there was a discussion going on between them.

The Court: I understood you to say that you were so advised by the minutes of the pretrial conferences. I, of course, have not consulted those minutes recently—

Mr. Wels: I am quite sure that in the June 25th minutes there is some reference to a settlement.

The Court: But, in any event, he was not here on October 7th.

Mr. Wels: Yes.

Now, your Honor, I thought that before coming here this morning I should find out the current status of the situation, and last evening I called the overseas operator and placed a call to Mr. Birrell and I received a call this morning just before I left.

Mr. Birrell has asked me to state to the Court that as soon as he is advised by his doctor in Havana, and the doctor feels that he can come back here to New York, that he will be here to testify in this contempt proceeding and in these other proceedings.

He has also asked me to tell the Court that in the event that there is some time urgency, some time pressure, with respect to getting his testimony as to these Reldan matters, that he would be very glad to cooperate with the Court to the extent of giving a deposition in Havana and answering whatever questions may be put to him.

The Court: Did he indicate to you when his doctor said —I notice that the doctor's last certificate indicates that he could make no prognosis as to when Mr. Birrell would be in a position to return.

Mr. Wels: The doctor's estimate, your Honor, was 60 days and it might be before then. This man has gone through a tremendous series of shattering experiences in the last several months. He has gone through changes that have made wrecks of people and he has reached the breaking point and is falling apart at the seams. He is there under a doctor's care. The doctor is a highly reputable physician in Havana, and I am sure that Mr. Devaney's contact at the Embassy verified that to him.

This man, your Honor, is not trying to evade the process of this Court

The Court: Mr. Devaney—

Mr. Devaney: Yes, your Honor.

The Court: I have been under the impression that the SEC cannot proceed in the trial of this complaint against the remaining defendants, Reldan and Cohen, without having Birrell's testimony; is that correct?

Mr. Devaney: That is correct, your Honor.

The Court: Now, could his testimony be adequately reduced to an introducable form by deposition of interrogatories?

Mr. Wels: When I say "deposition," your Honor, it could be an oral deposition as well as interrogatories.

The Court: Yes, I understand that.

Mr. Devaney: To take his deposition in Havana, your Honor?

The Court: Yes. Could the SEC obtain the proof adequately that it wants from Birrell by deposition rather than having him personally in court?

(Mr. Devaney confers with Mr. Windels.)

Mr. Devaney: Your Honor, after discussing this with Mr. Windels, we believe that Mr. Birrell is an adverse witness. We think that although we may be able to get some facts by means of deposition, the better way is to have Mr. Birrell here in court.

The Court: Am I to understand that the belief is that if the Court concludes that he is a hostile witness, you will be permitted the latitude that normally is allowed in cross-examination?

Mr. Devaney: Yes, your Honor.

The Court: I see. And you doubt whether you could accomplish that result by merely an oral deposition?

Mr. Devaney: That is right, your Honor.

The Court: Mr. Wels, are you authorized to stipulate that if an oral deposition were directed that no objections would be made to any questions that might be propounded?

Mr. Wels: I have not discussed that with Mr. Birrell but I would put it to him, your Honor.

May I say that it is my honest belief, your Honor, and I am not addressing this personally to Mr. Devaney or to Mr. Windels or anything like that, but it is my honest belief that all of the facts that they might want to ascertain from Mr. Birrell with respect to the Reldan matters can be easily obtained with full cooperation by deposition. It is my belief that regardless of any other considerations the reason they want him brought into this courtroom is because they want to question him not with respect to the Reldan matters and the matters at issue but with respect to highly collateral things relating to other matters.

Mr. Devaney: Your Honor, I think that remark by Mr. Wels is indicative of the whole program in which we have tried to obtain these facts before your Honor. The Commission is charged with a duty here and in doing its duty it found certain violations of law, and following a mandate of Congress, we filed an action in this court.

Prior to that we tried to obtain certain information and we served a subpoena, an administrative subpoena, calling for the production of the books and records of the Swan Finch Oil Corporation. We were assured by counsel for the corporation, Mr. Wels, that we can have the books and records. Nobody knows where the books and records are today. Mr. Wels said, "I will bring in this today and this tomorrow." We cooperated with Mr. Wels—

Mr. Wels: My recollection is very clear that I said I would do everything—

The Court: I will tell you what I am going to do on an ad hoc basis: I am going to adjourn this application until Monday morning. In the meantime I want the SEC to be in a position, after due consideration to advise me anew whether they can get what they seek by deposition.

In the meantime I want Mr. Wels to communicate with Mr. Birrell and be in a position to inform me in answer to my question, i.e., that if his testimony is taken by deposi-

tion, will he waive all objections to any questions propounded.

I will be in a better position to determine what the next step should be after I get an answer to these questions.

Mr. Wels: May I make one comment, your Honor?

The Court: Yes.

Mr. Wels: With respect to that it would seem to me that if we know the area or range of the deposition, in other words, if the deposition is to be limited to the matters that arise in this issue between the Commission and Reldan, that relate to these transactions, I think there would be no difficulty in getting an agreement on Mr. Birrell's part, but if the Commission wants to go on a fishing expedition—

The Court: It will be necessary for Mr. Windels, Mr. Devaney and Miss Evers, between now and Monday, to determine just how broad they feel their examination will have to be and then we will get an indication from them.

I take your position to be that you think that Mr. Birrell would not interpose any objection to any questions provided the questions dealt solely with dealings between him and/or his company and Reldan and Cohen.

Mr. Wels: Right.

The Court: Now I am not going to press the representatives of the SEC for an answer at this moment as to whether that would be satisfactory.

Frankly, if they come in and say that it would not be satisfactory, then we will have to take it from there. They may want to discuss it and consider it—consider to what extent testimony de hors the arrangement between those whom I mentioned might be admissible.

In any event, I think that they should have an opportunity to think about it. So the disposition of the matter as of today is that it is deferred until 10:30 Monday morning. At that time I will expect a reply from the representatives of the SEC as to whether they are willing to

limit themselves to those questions; and, on the other hand, I would expect information from Mr. Birrell beyond that which you have suggested that he may consent to, i.e., whether he will waive objections only to those transactions or waive objections to any avenue of inquiry.

Mr. Wels: In other words, if the Commission would—I am not asking them to tell us what questions they are going to ask—but they could tell us what the areas or the range of the thing is going to be, I don't think there is going to be any difficulty if it is going to be restricted to matters that are relevant and germane.

The Court: Of course, Mr. Wels, we know from experience in this court, and you know as an outstanding member of our bar, that a deposition is a sorry substitute for having a man on the stand.

Incidently, there is one thing I should like to know, even if we remain at an impasse on this question of the deposition. I would like to have something a little more positive from Mr. Birrell's doctor next Monday morning as to just when he feels he may be in a condition of recovery and reduction that he can come back here and testify at the trial.

Mr. Wels: May I say this, your Honor:

Mr. Devaney: If Mr. Wels is going to talk to Mr. Birrell on the telephone, the Reldan transactions go back as far as January of 1954 and they interspersed all the way through this period up to March of 1957.

The question cannot only be, "Did you lend the money," but the source of it and everything else must be gone into. Those are the questions that we want to ask Mr. Birrell.

And I think that Mr. Wels should know that we cannot only say, "Did you borrow money on this stock," but I want to know why Mr. Birrell had the stock, what authority he had, where he obtained the stock, what he did with the money, and everything else, to prove what the picture is here.

Appendix B.

As to the limited deposition, we can give you our answer today, that we must have complete latitude here because of the complex nature of the whole matter before us.

The Court: I will adjourn the entire matter—

Mr. Wels: If what Mr. Devaney is saying is that he wants to ask questions with respect to the source of the ownership, of the particular securities that were pledged, as to what was done with the proceeds of the loan, on those things, there will be no objection to that, your Honor.

The Court: Mr. Devaney was just indicating to you how far afield from this specific lending and borrowing involved in each transaction they feel will have to go. On that basis, possibly we can resolve it in some way on Monday morning.

In any event, I don't think beyond the issuance of a bench warrant that I could do anything today. And I am not disposed to do that until we explore every other method of getting the end result, i.e., the testimony of Mr. Birrell.

So we will stand in adjounrment of this matter until 10:30 Monday morning.

Mr. Devaney: Thank you, your Honor.

(Adjourned to November 4, 1957, at 10:30 a. m.)

Appendix B.

UNITED STATES OF AMERICA
vs. C. 154-351
LOWELL M. BIRRELL

New York, November 4, 1957,
10.30 a.m.

(Hearing resumed)

Present:

Mr. Devaney, Jr.,
Mr. Evers,
Mr. Wels.

Mr. Devaney: Your Honor, after leaving last Friday, at which time you adjourned this matter over until 10.30 this morning and directed the Commission to report back to you as to whether or not a deposition taken from Lowell M. Birrell in Havana, Cuba, might be a satisfactory method of getting his testimony in the pending suit, we have given that much consideration and it is the opinion of the Commission that a deposition taken in Cuba would not bring forth the evidence necessary for the Commission to properly present its case to your Honor in this lawsuit.

That conclusion was reached on the basis of several things: one, that Mr. Birrell deliberately removed himself from the jurisdiction of this court on October 5, 1957.

Mr. Birrell's counsel related last Friday that Mr. Birrell did not appear on June 10th because he read the pretrial transcript and knew that testimony would not be taken on June 10th and that matter was adjourned over until October 7th. Mr. Birrell was, therefore, well aware that he was due in this court on October 7th prior to the serving of the subpoena on him on October 4th.

There has been nothing brought before this Court on Friday, and nothing that the Commission has been able to determine, whether Mr. Birrell actually had planned to leave Cuba in order to be in this Court on October 7, 1957, and here to give testimony.

After leaving the court room Friday, my attention was called to another matter pending in the Southern District of New York, the case of Continental Bank and Trust Company, receiver of Inland Empire Insurance Company, plaintiff, vs. Lowell M. Birrell and others. The matter was looked into by one of my attorneys. On July 2, 1957, the Court issued a subpoena directing Lowell M. Birrell to give testimony as a witness in this cause on October 1, 1957, at 10 a. m.—

The Court: Was it on a trial or by way of deposition? Would you know, Mr. Wels?

Mr. Wels: No, this is the first I have heard of it.

Mr. Devaney: (To Mr. Greaney) Do you know whether that was for a trial or to give a deposition? Was it for his appearance for an examination before trial?

Mr. Greaney: That was for his appearance for an examination before trial.

The Court: All right, that ends it; it was for a deposition.

Mr. Devaney: It was for a deposition, but Mr. Birrell did not appear, and there is a memorandum in the file endorsed by Judge Ryan that Mr. Birrell be held in contempt, motion granted unless defendant Birrell appears for examination at 10 a. m. on October 30, 1957, in the United States Court House, Clerk's Office, Foley Square, New York.

The Court: What is the date?

Mr. Devaney: It is dated October 8th.

The Court: Unless he appears when?

Mr. Devaney: October 30, 1957.

The Court: October 30th?

Mr. Devaney: Yes, your Honor.

The Court: All right.

Mr. Devaney: And the clerk has noted that Mr. Birrell failed to make his appearance.

Now, in another matter and one—

The Court: I am satisfied, without your laboring it any further, that there is ample basis for the Commission to indicate that the cold project of a deposition is not adequate for it to adduce whatever proof it feels is necessary to indicate that the relationship between Birrell and his companies on the one hand, and Cohen-Reldan on the other, was such as to invite the inference that Reldan was not a bona fide purchaser. I am satisfied that your position is valid on that score.

Now, then, that causes me to interrupt you and turn to Mr. Wels and ask whether he has ascertained, as I requested him to do, when Mr. Birrell's health will be such, in the opinion of his doctors, that he can come to be a witness in this matter.

Mr. Wels: Your Honor, I communicated with Mr. Birrell, as your Honor instructed. While your Honor seems to have come to the conclusion that the deposition would not be satisfactory, I feel that for the purpose of the record I would like to place before your Honor the statements that I received with respect thereto.

I discussed with Mr. Birrell the question limiting the scope of the deposition, and we concluded that so far as this matter stands at the present time, it is a matter between the Commission and Reldan, that Mr. Birrell appears as a witness and as a witness of course he would be free to invoke any Constitutional rights which he might have; he would also be free to invoke the privilege of attorney and client to discuss any communications that he might have received with respect to the matter.

As to anything else, he would have no status whatever to make any objections on any ground to any questions which Mr. Devaney or any member of the staff of the Commission would put to him, and if a deposition was conducted he would not propose to attempt to make any such objections.

Of course, so far as the defendants are concerned, Reldan is a party, and I have not discussed this with the attorneys for Reldan, but I would assume that they would be present at any deposition or at any examination in this court room, and that they would be free to make whatever objections to anything they might want to make.

But, so far as Mr. Birrell is concerned, apart from any Constitutional rights or any privileged communications that might be involved, he would be available to answer any questions which the Commission might put to him and to which the Reldan people might not make objection.

The Court: Where and when?

Mr. Wels: Now, so far as Mr. Birrell's medical situation is concerned, he saw the doctor yesterday or had the doctor come to see him at his apartment, and the doctor says that it is absolutely essential that under this regimen he must stay put until he has lost another 15 pounds. He is losing at the rate of about one pound a day. In about two weeks' time he would be at that stage where the doctor would then make additional X-rays and additional checks and will then be able to tell us without any question as to when he can be here. He may be able to be here very shortly thereafter.

I am not a physician and I have difficulty enough sometimes in being a lawyer and answering legal questions, but, in any event, in about two weeks' time the doctor will be able to state positively a date on which he can come.

The doctor was most anxious that he be kept quiet and that he not even give a deposition and he told Mr. Birrell

that if he did it that he would do it at his own risk, and Mr. Birrell was prepared to risk it to the extent of suggesting himself that a deposition be taken down there regardless of the doctor's instructions.

The Court: I am going to adjourn this matter until November—

Mr. Devaney: Your Honor, maybe we can save your time. Another matter has come up. There is a stockholders protective committee formed for the interest of the Swan-Finch stockholders and it is represented by the law firm of Kaye, Scholer, Fierman and Mayo. Mr. Joseph Moscow of that firm talked to me Friday and said, "Mr. Devaney, we may be able to get some information from Cuba regarding Mr. Birrell if you want"—

The Court: Let us assume, Mr. Devaney, that all of this story that Birrell is telling his counsel is false—let us assume that.

Mr. Devaney: Yes, your Honor.

The Court: Where do you go from there?

Mr. Devaney: Well, I think—

The Court: I am a realist about these things. Mr. Birrell is out of the jurisduction—

Mr. Devaney: Yes, but your Honor has a right to issue a warrant of arrest for Mr. Birrell for being in contempt of this court. Mr. Birrell is, according to the information received—

The Court: I am not relinquishing jurisdiction to ultimately determine whether it is a contempt or not. I am concerned about getting a trial out of the way here.

Mr. Wels: Your Honor, Mr. Birrell has assured me that—he asked me that I may assure your Honor that immediately upon Mr. Birrell's return to health he will immediately present himself here for such examination as the Court may require.

The Court: Even if it were within the authority of the

Court to my issuing a bench warrant for the man's apprehension—

Mr. Devaney: Well, your Honor—

Mr. Wels: It is intended to make the headlines your Honor.

Mr. Devaney: No, your Honor. We have this situation. In a situation like this we have all sorts of information that is furnished to the Commission.

Another fact which was presented to us Friday afternoon, which I cannot substantiate, is that Mr. Birrell intends to leave Cuba and to go to Europe. Now, if we have—

The Court: If I issue a bench warrant, how is that going to stop him?

Mr. Devaney: That will enable us to go to the State Department to have his passport picked up so that the only place that he could return to would be from Cuba.

The Court: Can I issue that to the State Department for that purpose under the present state of the record?

Mr. Devaney: That is right, your Honor. I have been advised through Mr. Windels that they have been in touch with the passport division and that unless there is a warrant of arrest they can do nothing about his passport.

The Court: What about that?

Mr. Wels: I have no indication whatever, your Honor, that Mr. Birrell has any intention of going to Europe.

Mr. Birrell has told me that as soon as he is permitted by his doctor to leave Cuba he is coming to New York because he has many pressing problems to take care of here.

And, your Honor, I think that Mr. Devaney has a great deal of information from Cuba which has not been disclosed to the Court. For instance, a week ago Sunday Mr. Birrell's apartment was visited by a representative of the Cuban Secret Service at the request of the Embassy

and at the request of the Commission, to verify the fact that Mr. Birrell was ill in bed, and the representative of the Cuban Secret Service found him in bed. I am sure that Mr. Devaney and the Commission has information about that, but that was not submitted to the Court.

On Friday afternoon, early Friday afternoon—

The Court: Let me interrupt you and inquire of Mr. Devaney: Suppose I were to adjourn this matter until the 20th and at that time get no satisfactory indication as to a fixed date when Mr. Birrell would return and I would issue a bench warrant at that time but Mr. Birrell was still in Cuba, and putting it on that first hypothesis your position would be no different than it is today, is that correct?

Mr. Devaney: That is correct.

The Court: On the other hand, supposing he had gone to Europe, he would have gone on an American passport, is that correct?

Mr. Devaney: That is right.

The Court: How would you be prejudiced by my issuing a bench warrant then and having his American passport picked up and bring him back from wherever he is in Europe as distinguished from Cuba? You do not expect that he is going to the Soviet Union, do you?

Mr. Devaney: I can't answer that. I don't think so, your Honor. The only question there is that we will then be faced with the problem of locating Mr. Birrell again with additional expense—

Mr. Wels: The Commission won't have any difficulty in locating Mr. Birrell and the Commission isn't going to have any additional expense—

The Court: The matter is adjourned until 10:30 on November 20th for all purposes. At that time I expect a definite statement from you, Mr. Wels.

Mr. Wels: Yes, sir.

The Court: As to whether or not Mr. Birrell will be available to participate as a witness in the trial.

Mr. Wels: May I say, your Honor, just so there is no suspicion about these matters, I myself am leaving for Europe because I have got to be in court in Monte Carlo in connection with an estate matter. I will be back here prior to the 20th, in case there are any matters pertaining to or which have anything to do with Mr. Birrell or any of his affairs.

The Court: All right. 10:30 November 20th, in whatever room I am assigned to. It will probably be this room here.

(Adjourned to November 20, 1957, at 10:30 A. M.)

Appendix B.

For Immediate Release Monday, November 18, 1957

Securities and Exchange Commission
New York, N. Y.

Paul Windels, Jr., Administrator of the New York Regional Office of the Securities and Exchange Commission, today announced that Judge Sidney Sugarman of the United States District Court for the Southern District of New York, has signed an order of final judgment permanently enjoining Reldan Trading Corporation and Benjamin C. Cohen, its president, from offering to sell or selling any shares of the common capital stock of Swan-Finch Oil Corporation unless such securities are registered as required by the Securities Act of 1933 or are entitled to an exemption thereunder. The defendants Reldan Trading Corporation and Benjamin C. Cohen consented to the entry of the judgment.

Mr. Windels further stated that this concludes the litigation commenced last April when a complaint was filed to enjoin Swan-Finch Oil Corporation, Lowell M. Birrell, its dominant officer, and other officers and directors of Swan-Finch Oil Corporation and certain broker-dealer firms from violating the registration provisions of the Securities Act of 1933 in the offer and sale of Swan-Finch stock. Among the defendants was Norris-Adams, Ltd., a broker-dealer located in Toronto, Ont., Canada; and the action with respect to this defendant was dismissed in view of the inability of the Commission to effect service upon it. All other defendants, including Lowell M. Birrell, had previously consented to the entry of judgment of final injunction.

The Commission was represented in the action by Mr. Windels and John J. Devaney, Jr. and Eileen E. Evers, Attorneys of the New York Regional Office. The investigation was conducted, under the supervision of Mr. Windels, by Cornelius F. Griffin and Anthony A. Becker, Securities Investigators attached to the New York Regional Office.

Litigation Release No. 1176

Appendix B.

UNITED STATES OF AMERICA
vs. C. 154-351
LOWELL M. BIRRELL

New York, November 20, 1957,
11.45 o'clock a. m.

(Hearing resumed)

Present:

Mr. Devaney,
Miss Evers,
Mr. Wels.

The Clerk: United States of America against Lowell M. Birrell. Gentlemen, are you ready?

Mr. Wels: Your Honor, when we were last before your Honor on November 4th, your Honor concluded the session that day by directing us that we be here today and telling us that you expect to get a statement from me today as to when Mr. Birrell would be able to come up to New York for the purpose of testifying in the Commission's proceedings against Reldan Trading Company and Benjamin Cohen.

Since that time I understand that the Reldan Trading Corporation and Benjamin Cohen have consented to the entry of an injunction, a permanent injunction, against them, and, therefore, there is no testimony needed from Mr. Birrell in the main Swan-Finch case, which is now concluded with respect to all defendants, so that any necessity for his appearance for the purpose of testifying in this case is at an end.

Appendix B.

When I returned from London yesterday afternoon, I telephoned to Havana, nevertheless, for the purpose of ascertaining the current status of Mr. Birrell's physical condition, in case your Honor requested it, so that I might be able to make a report to you.

I am told that he has made progress. You will recall that when we were first here before you on November 1st, that the medical statement of the physician under whose charge he was, indicated that about 60 days more was required for medical treatment and that he would try to speed that up.

I am told that progress has been made; that the doctor is still very much concerned about a large area of fatty tissue around the heart which has still not liquidated, and that he estimates that it will be necessary for about another two weeks of treatment before that can be done, and that if it has not disappeared by then steps in the nature of surgery might be necessary. That is the status with respect to his health.

The Court: Well, it is quite true that the main case has now been entirely settled, but there still remains open, in my view, the question of whether Mr. Birrell's failure to appear here on October 7th under the subpoenas that were served upon him, one in the spring of the year which was adjourned to October 7th, and the other on October 4th, I believe it was at LaGuardia Airport, whether his failure to appear here at that time was a deliberate flouting of the Court's authority, and in the light of the fact that I considered that that issue still remains for resolution—and I take it from your statement that Mr. Birrell is not present today.

Mr. Wels: Mr. Birrell is still in Havana.

The Court: Then I think, for the purposes of initiating such action by the State Department as may be necessary

to lift his passport to get him here, I am going to request the SEC or counsel for the SEC to present to the Court for signature a bench warrant.

Mr. Devaney: Yes, your Honor, that will be done.

Mr. Wels: Your Honor, may I suggest to your Honor that this seems to me a completely unnecessary step for the Court to take.

The Court: May I suggest, Mr. Wels, that it does not seem completely unnecessary to me. The only thing is, I have the notion that he is trifling with the Court.

Mr. Wels: Your Honor, I can assure your Honor that as soon as he is able to he will be in New York and that he will make himself available.

The Court: Well, the bench warrant may be the modus operandi for his being in New York before he is released from Cuba, because I understand that he is in Cuba by virtue of an American passport.

I want to know why he did not come here on October 7th, and I intend to hold a hearing to find out why he did not come.

Now if he can persuade me, or, better yet, I think the burden is on the plaintiff, the SEC—if they can persuade me that his absence on October 7th was deliberate and calculated, that there was no basis because of the condition of his health for him not to have remained, then I intend to hold him in contempt.

On the other hand, it is a proceeding very much akin to a criminal proceeding, and I believe that the quantum for judgment is reasonable doubt rather than a preponderance of the evidence. But I intend to hold a hearing and I intend no longer to await Mr. Birrell's convenience.

Mr. Wels: Your Honor, this is not a matter of his convenience but it is a matter of a medical situation. I am

sure that your Honor would not want to jeopardize his physical recovery.

The Court: Well, we have pretty good doctors in New York, the best in the world, and as good as the Cuban doctors, I am sure, and if he has fatty tissue around the heart he can rest here as well as he can in Havana.

So, under the circumstances, I am now instructing the counsel for the SEC to present a bench warrant for Mr. Birrell's apprehension.

Mr. Devaney: That will be done, your Honor.

The Court: And as soon as he is apprehended, by whatever devices are employed to get him back here, we will set a date for a hearing and you have notice thereof, counsel, so that he can be prepared and understands fully what is expected of him. In other words, I will expect of him to meet an issue which is imposed upon the Government to show that his absence on October 7th was deliberate and calculated and not justified by his condition.

Mr. Devaney: Thank you, your Honor.

Appendix B.

UNITED STATES OF AMERICA
vs. C. 154-351
LOWELL M. BIRRELL

New York, December 2, 1957.

Present:

Mr. Devaney,
Miss Evers,
Mr. Wels.

Mr. Wels: Your Honor, this is an application on behalf of Lowell M. Birrell to quash the warrant which was issued at your Honor's direction for his arrest on November 20 and to vacate the order which was contained in the minutes of the hearing directing the issuance of that warrant. Your Honor directed the marshal to arrest Mr. Birrell and bring him before the District Court here for the reason that he wilfully failed to appear after having been served with a subpoena to appear at the trial of the Securities and Exchange Commission against Swan Finch on the 7th day of October, 1957, and thereafter having failed to respond personally to an order to show cause duly issued on the 11th day of October, 1957.

I want to point out to your Honor that the order to show cause which was issued by your Honor contained specifically in it a provision that service shall be made personally by a United States marshal upon Lowell M. Birrell on or before the 23rd day of October, 1957, that the marshal has reported that no service was ever made on Mr. Birrell; so that I am somewhat at a loss to understand and I didn't know that it was contained in the warrant that an application should be made with respect to a discharge thereof.

Now, your Honor, we ask you to vacate this subpoena on the general ground that the acts for which Mr. Birrell has been cited are at best those of a civil contempt, that the

purpose of the contempt proceedings and the issuance of the warrant were in your Honor's own words for the end result of getting Mr. Birrell's testimony, that from the very first time that the contempt proceedings or the issuance of a warrant was mentioned in this court by Mr. Devaney, or any of the other representatives of the Commission or by your Honor, it was specifically mentioned as the weapon to secure Mr. Birrell's presence here and to coerce him into testifying. I think the first time it was ever discussed was on October 7th. At that time Mr. Devaney said to your Honor:

> "I would suggest your Honor issue a bench warrant or something else to insure his appearance here."

Your Honor's discussion that day related to the feasibility of issuing a warrant for the purpose of getting him to come up here and testify. When we suggested to your Honor that Mr. Birrell was willing to give a deposition in Havana and would give the testimony which was sought there, your Honor said that he wanted the Commission to explore this to find out whether this would solve the problem and whether this might not provide the testimony which was needed and which your Honor later said was the end result that was desired from these contempt proceedings and from the issuance of a warrant. In fact, after the Commission declined to take Mr. Birrell's deposition, which offer was given in good faith and which, as your Honor knows, had no conditions attached to it—Mr. Birrell said he would make no objections to questions that were asked of him, excluding any possibility of a constitutional right which might conceivably be invoked—after the Commission had declined to accept a deposition your Honor said on November 1:

> "In any event, I don't think beyond the issuance of a bench warrant that I could do anything today.

> And I am not disposed to do that until we explore every other method of getting the end result, that is, the testimony of Mr. Birrell."

So that I think that nobody can dispute the fact that the whole purpose of these contempt proceedings, the whole purpose of issuing a warrant when it was suggested was not to punish Mr. Birrell, not to vindicate any public wrong that he had done—

The Court: I hate to interrupt you, but I do want the record to show that I do not subscribe to your statement that nobody can dispute that fact. I dispute it. Now you may continue, Mr. Wels.

Mr. Wels: I am merely confining myself to the record, your Honor.

The Court: Yes, of course.

Mr. Wels: Again Mr. Devaney requested the issuance of a warrant for Mr. Birrell's arrest so that Mr. Birrell's passport could be picked up and he would have to return from Cuba to New York. Mr. Devaney said in the record:

> "That will enable us to go to the State Department to have his passport picked up so that the only place he could return to would be here from Cuba."

There was then a discussion on your Honor's part as to whether the same thing might not be accomplished if in the remote possibility that which Mr. Devaney referred to took place and your Honor suggested he could be picked up just as easily in Europe and returned here for the purpose of giving testimony.

Now, on November 18, of course, the significant factor occurred of the last two defendants in the main case in which Mr. Birrell's testimony was wanted, Reldan and Cohen, consenting to an injunction and the injunction be-

ing entered against them so that the case in which his testimony was wanted came to a conclusion, and so far as that case was concerned there was no testimony which this Court could hear because it had been resolved as to everybody. Then your Honor said:

> "Then I think, for the purpose of initiating such action by the State Department as may be necessary to lift his passport to get him here, I am going to request the SEC or counsel for the SEC to present to the Court for signature a bench warrant."

I would like to point out to your Honor that throughout these proceedings the contempt proceedings have been handled exclusively by the SEC. The application for the order to show cause why Mr. Birrell should not be punished for contempt is in the backs of the Commission. It is subscribed to not only by Mr. Devaney, but also by Paul Windels, Jr., Regional Administrator, William D. Moran, Assistant Regional Administrator, and Eileen E. Evers, attorney. The order to show cause why he should not be punished for contempt again appears in the back of the Securities and Exchange Commission.

The Court: Well, I will interrupt again to indicate that no purpose can be served by belaboring that fact, because I call your attention to the fact that Rule 42 of the Federal Rules of Criminal Procedure provides in subdivision (b), which deals with the disposition of a criminal contempt upon notice and hearing:

> "The notice shall be given orally by the judge in open court in the presence of the deefndant or, on application of the United States attorney or"—

and now I emphasize—

"of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest."

I appointed counsel for the SEC for that purpose prior to the time that you mention. So the mere fact that counsel for the SEC appears as the prosecuting attorney in this matter is of no moment.

Mr. Wels: Well, I think in the terms of the Gompers case, which I understand is the controlling authority, it has significance.

The Court: It did until November 25, 1957, when the United States Supreme Court handed down the decision in Yates v. United States of America, and I would read just two lines from that that, I think, disposes of the entire rationale of your moving papers, which I have carefully read in the interim. Unfortunately, I can't give you the volume number, because I only got this slip sheet last Friday. This is a decision that is only about a week old, but in referring to Gompers they said:

"While imprisonment cannot be used to coerce evidence after a trial has terminated, Yates v. United States, 227 F. 2d 844; cf. Gompers v. Bucks Stove and Range Co., 221 U. S. 418, 443, 449 (1911), it is unquestioned that imprisonment for a definite term may be imposed to punish the contemnor in vindication of the authority of the court."

So that while I agree with you that Gompers holds that Reldan and Cohen having taken the action that they did and Mr. Birrell could no longer be imprisoned to coerce evidence in the trial that never could be held, there still survives the power in the court, however, to imprison him if it sees justice in so doing for his having flouted the subpoena. Now, that is the only purpose of the continuation of this proceeding, for Mr. Birrell to come here and

for us to determine whether he deliberately or otherwise flouted the subpoena that required him to be here on October 7th, and that power is distinctly recognized in this case of Yates v. The United States of America.

Mr. Wels: The Yates case did not distinguish the Gompers case on this point and I do not believe it overruled it.

The Court: I didn't say that it did.

Mr. Wels: In the Gompers case the Court said that in looking at a particular contempt proceeding and in determining whether or not it was a proceeding for civil contempt or a proceeding for criminal contempt one had to look at the essential facts of what was done and—

The Court: Well, Mr. Wels, I agree with you that the purpose originally in going through these proceedings was to get Mr. Birrell here to testify in a pending matter, but I think it is beyond doubt that where I continue to retain jurisdiction and make affirmative moves after the main trial had been disposed of by the confession of judgment by the two remaining defendants I was not on the course of getting Mr. Birrell here to testify in a case that could never get tried; I was on a course of getting Mr. Birrell here, and that is why I issued a bench warrant for his arrest, in order to have him answer the charge. I think I have indicated by the statements that I made throughout this entire proceeding that the measure is not a fair preponderance, but beyond a reasonable doubt, the reason for his not having been here on October 7th. I think that is a pretty clear indication.

Mr. Wels: At the same time your Honor suggested that it would be up to Mr. Birrell when he got up here to show that he did not deliberately flout the Court.

The Court: I doubt that. If I made that statement—and I have a recollection that I might have—I qualified it and corrected it and I think the record will so disclose, unless I am completely mistaken, that I always made it

clear that the burden here was the burden on the Securities and Exchange Commission, that the burden was one beyond a reasonable doubt, in other words, the burden that prevails in a criminal proceeding, and when I continued to act beyond the time when we ever could have brought Mr. Birrell here for the purpose of testifying in a trial that could not be held there remained only the question of a criminal contempt. Did he deliberately and without justification beyond a reasonable doubt flout the subpoena that was served upon him on October 4th.

Mr. Wels: The Supreme Court has said in the Gompers case and it has said again in Penfield Co. v. Securities and Exchange Commission and in Lamb v. Cramer and half a dozen other cases since then, that where a defendant has refused to do an affirmative act provided by the provisions of an order which was mandatory in form that that is nothing but a civil contempt, that where he deliberately goes out and does some affirmative act in disobedience to a court order, that then it is a criminal contempt.

The Court: I think you are begging the question, because he did the affirmative act on October 4th in getting off a plane at LaGuardia when he was served with a subpoena and proceeding by taxicab over to Newark and getting on another plane and going to Miami and then getting on another plane and going to Cuba and remaining there. I don't think that the question is whether a contempt is civil or criminal hinges upon whether the act is one of commission or omission, because if that is the rationale of your argument I can't accept it.

Mr. Wels: It was accepted by the Court of Appeals in Harris v. Texas & Pacific Railway Company, where the witness who happened to be the secretary of the Railroad Retirement Board refused to comply with a subpoena of the United States District Court to appear and testify and produce certain records in a civil suit. She was held in

contempt and committed to custody, but released on bail. The case in which her testimony was required came to judgment and the judgment was paid by the railroad. Thereafter the Court of Appeals vacated the contempt order and quashed the subpoena and said:

> "It is clear that the contempt involved in non-compliance with the order was civil contempt. The courts have consistently ruled that civil contempt proceedings are abated by a termination of the proceedings out of which they arose."

Also, in the De Parcq case, the Court of Appeals said:

> "This is on the assumption that the alleged contempt was a civil contempt. It embodies the elements which seems to characterize it as civil contempt rather than criminal contempt. The teaching of the Gompers case is to the effect that refusal to do an act commanded is civil contempt, while doing a forbidden act is criminal contempt. . . . The contempt proceeding was a part of the action between Dean and the Chicago Great Western Railway Company, and the termination of that action automatically renders the contempt proceeding moot."

The Court: I can only refer you once again to the language a week ago of the Supreme Court and I believe the decision was five to three, Justice Burton concurring and Justices Douglas, Black and the Chief Justice dissenting, and the language to me here regardless of any prior pronouncements is this:

> "While imprisonment cannot be used to coerce evidence after a trial has terminated . . . it is unques-

tioned that imprisonment for a definite term may be imposed to punish the contemnor in vindication of the authority of the court."

Mr. Wels: But if the proceedings, if the contempt proceedings, your Honor, were initiated for the purpose that they were initiated here and for that purpose only and bore all the characteristics that they bore here, the authority of the Court to proceed with any contempt proceedings terminates.

The Court: May I ask you to suspend a moment while I find the order to show cause in your moving papers? I think it is attached. Am I correct in that?

Mr. Devaney: Yes, your Honor; I have a copy of the order to show cause here, your Honor.

The Court: May I have it, please. I would point out to you, sir, that on October 11, 1957, at 4:45 when I signed the show cause order here a very deliberate effort was made to follow the pronouncements of Rule 42(b) of the Federal Rules of Criminal Procedure, and so you find in the order to show cause in capital letters next to the box, the title box, appear the words "Criminal Contempt" and then down at the last part of the first paragraph appear the words "and is guilty of criminal contempt."

Now, I respectfully suggest, sir, that despite the fact that up until October 7, when the trial was intended to commence, the purpose of serving the subpoena on Mr. Birrell and everything that we did while the trial was still not concluded by the confession of judgment by the remaining two defendants was intended for the purpose of getting him here to testify, I think it is manifest beyond any doubt that as of October 11, when this proceeding was commenced, the purpose of this proceeding was to punish Mr. Birrell for criminal contempt for flouting the subpoena.

Mr. Wels: Yet on November 1 at page 27 of the transcript your Honor said:

"I am not disposed to do that until we explore every other method of getting the end result, i.e., the testimony of Mr. Birrell."

The Court: That is correct.

Mr. Wels: On November 1st and November 4th—

The Court: And by those dates had the defendants Reldan and Cohen yet confessed judgment?

Mr. Wels: They had not.

The Court: Of course not. So that we have here what is permissible and is recognized in the Yates case, that you may have a contempt at a given time that is both civil and criminal. It may lose its civil aspect because of something that happens collaterally, and that is precisely what happened here, i.e., no trial being necessary you could not beyond that point coerce the testimony of the witness by civil contempt. But that did not eliminate the pending branch of this proceeding, which is manifestly to punish him for criminal contempt for failing to honor a subpoena, a process of this Court under, I believe it is, the last subdivision of Section 403 of Title 18.

Mr. Wels: In the Penfield case the Commission itself—and I have the Commission's brief here—went into the Supreme Court where a District Court had punished a witness for criminal contempt, and the Commission successfully took the position in the Supreme Court that the District Court could not impose a criminal contempt sentence, that these were coercive proceedings, that these contempt proceedings were intiated for the purpose of coercing the witness to testify, and that the only thing under such proceedings, regardless of what they were called by the caption, the only thing which the Court could do would be to impose a coercive penalty, and Mr. Justice Douglas wrote the opinion for the Supreme Court saying that this was so.

The Court: Well, Mr. Wels, my only answer to that is by telling you that on occasion I have asked Judge Rifkind, a former member of this bench, as you so well know—

Mr. Wels: Yes, he was my teacher.

The Court: (continuing) —to account for what appeared to be contradictions between what he had written as a judge and what he offered as an advocate, and his simple answer to that was—and I am sure that the SEC would follow that now in answer to your contention— "When I made that decision as a judge I erred." And I am sure that if the SEC took the position in any other proceeding the contempt could not survive as a criminal contempt once the need for coercive testimony had been eliminated, they would probably plead that in that petition they erred. But I don't care even if they were to come in now and acknowledge and say that you are right; I still have my own notions about this, and I think that if there were any doubt about it, what was said in the Yates case makes it very clear. Nobody denies the fact that in the beginning ab initio we wanted Mr. Birrell here, or they wanted him here for the purpose of testifying. But the mere fact that the case came to an end, does that mean the end of the contempt proceedings which in my view were clearly started to punish him for a criminal contempt?

Mr. Wels: Your Honor has obviously made up his mind and I don't know that there is any point in going on any further.

The Court: I don't want you to go out from here, Mr. Wels, with the thought that I have made up my mind without careful reading of your papers. I read everything you offered and I came here with an open mind in the hope that you might be able to persuade me that I am wrong. I regret to inform you that I am not persuaded.

Now, unless the Securities and Exchange Commission wants to be heard I will make a disposition.

Mr. Devaney: As of October 10th when you did appoint counsel to prosecute this action, you did appoint for the purpose of criminal contempt.

The Court: The motion is denied. The papers have been so endorsed.

Mr. Wels: Will your Honor so indicate by an order?

The Court: A short-form order on that? Motion denied. Settle order. Or do you want me to make them right on the papers?

Mr. Wels: Make them right on the papers.

The Court: All right.

Mr. Wels: Mr. Devaney has an order.

Mr. Devaney: I have an order.

The Court: You apparently were very confident of your position.

Mr. Devaney: We researched this very carefully, your Honor.

The Court: That your files may be conformed, I have endorsed on the bottom of the order to show cause under the date thereof, "December 2, 1957. Motion denied. Order signed. Sidney Sugarman, U.S.D.J." and I have signed the order submitted by the Securities and Exchange Commission without change.

Mr. Wels: Your Honor, do I understand that the Commission has submitted a brief which I have not a copy of? I would like to have a copy of it.

The Court: Well, I have not seen it, frankly. If they want as a matter of courtesy to give it to you, that is up to them, but I am not going to advise them to do so because I have not seen it. It has not been submitted to me.

Mr. Devaney: We had prepared a brief, your Honor, to be submitted.

The Court: Well, I would suggest that you gentlemen discuss that in the hall, as to whether they want to give you a copy of an unsubmitted brief or not.

Mr. Devaney: That is why I made no remarks concerning it.

Appendix B.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CRIMINAL CONTEMP NO. CR. 154-351

UNITES STATES OF AMERICA,

against

LOWELL M. BIRRELL.

CITY, COUNTY AND STATE OF NEW YORK, SS.:

SUSAN MILLER, being duly sworn, deposes and says: I am employed by Doeskin Products, Inc. at their offices at No. 41 East 42nd Street, New York City, in a secretarial capacity.

On Friday, October 4, 1957, at about half past eleven in the morning, I received a telephone call from Mr. Lowell M. Birrell, the Chairman of the Board of Directors of Doeskin Products, Inc. from Montreal, Canada. Mr. Birrell informed me that he had arranged to be on Eastern Air Lines Flight No. 45, which was scheduled to leave Montreal at three o'clock that afternoon, and was scheduled to arrive at LaGuardia Field at 4:36 P. M. Mr. Birrell informed me that it was necessary for him to be in Havana, Cuba on the following morning, and instructed me to arrange transportation out of New York for Havana immediately following his arrival from Montreal. He informed me that the last daily flight from Miami to Havana on Cubana Airlines left Miami at 9:50 P. M., and he said that if I obtained a seat for him on Eastern Air Lines' six o'clock from Newark to Miami, this would permit him to be aboard the 9:50 P. M. flight from Miami to Havana. He instructed me to make both of these plane reservations for him, and get a Carey car to meet him on his arrival at LaGuardia Field and drive him to Newark.

Appendix B.

After receiving this telephone call from Mr. Birrell, I telephoned Eastern Air Lines' reservation desk in New York to make these reservations. I was told by the clerk that the flight which was wanted was Flight 657 leaving Newark for Miami at 5:55 P. M. The clerk also informed me that the flight was full but that he would place Mr. Birrell on the waiting list, and that he was reasonably sure that Mr. Birrell would get on the plane. We also confirmed space for Mr. Birrell on the 9:50 P. M. flight from Miami to Havana.

Because of the Jewish Holy Day, Yom Kippur, which began on the afternoon of October 4, no Carey cars were available until after five o'clock. Accordingly, I proceeded to LaGuardia Airport by taxi. On the way to the airport, I explained to the driver that I was *meeting my boss and* that we had to get to Newark in time to make the 5:55 P. M. flight to Miami. I made a deal with the driver on a flat-rate basis for him to wait for us at LaGuardia and drive us out to Newark.

The plane was about fifteen minutes late coming in to LaGuardia Airport, and in fact did not land until almost five o'clock. Mr. Birrell was served with a subpoena as he came down the steps of the plane.

Mr. Birrell and I got into the waiting cab and started for Newark. The driver did his best, but when we arrived at Newark Airport and hurried to the gate from which the plane had been loading, we found the gate closed and the plane departing. Mr. Birrell then arranged at the Newark Airport for a seat on the next flight out, which left LaGuardia Airport at midnight.

SUSAN MILLER.

Sworn to before me this
24th day of October, 1957.

CURTIS C. WHITNEY, Notary Public,
State of New York, No. 30-9651000,
Qual. in Nassau County,
Cert. filed in New York Co. Clerks & Regs.,
Commission expires March 30, 1958.

Appendix B.

Order to Show Cause Why Defendant Should Not Be Punished for Criminal Contempt.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Criminal Contempt No. CR 154-351

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL.

It appearing to the court, on examination of Application for an Order to Show Cause and the affidavits in support thereof, that reasonable cause exists for believing that Lowell M. Birrell has failed to obey the subpoena to appear and give testimony in the cause entitled "Securities and Exchange Commission, plaintiff v. Swan-Finch Oil Corporation et al., defendants", Civil Action 119-232, and is guilty of criminal contempt as indicated in the Application annexed hereto:

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

(1) That the Application be filed, and a copy of same, together with a copy of this order be served upon the said Lowell M. Birrell.

(2) That the said Lowell M. Birrell show cause before me on the 1st day of November, 1957, in Courtroom 705

of the U. S. Courthouse, Foley Square, City, County and State of New York, at 10:30 A. M., or as soon thereafter as he may be heard, why he should not be adjudged in criminal contempt of this court for not obeying the subpoena in the cause entitled "Securities and Exchange Commission, plaintiff v. Swan-Finch Oil Corporation, et al., defendants", Civil Action No. 119-232, and punished accordingly.

Service shall be made personally by United States Marshal upon Lowell M. Birrell on or before the 23rd day of October, 1957 on or before 5:00 P. M.

Copies of the within order and the papers on which it is granted shall be mailed (registered or certified, return receipt requested) to Richard H. Wels, Esq., 551 Fifth Avenue and to Lowell M. Birrell, at de la Calle 21 No. 15 St. El Vedado, Habana, and at Doeskin Products, Inc., 41 East 42nd Street, New York City, N. Y., on or before October 18, 1957.

SIDNEY SUGARMAN,
United States District Judge.

Dated: N. Y., October 11, 1957, 4:45 P. M.

Appendix B.

Application for Order to Show Cause Why Defendant Should Not Be Punished for Criminal Contempt.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Criminal Contempt No. .....

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL.

To the Honorable Judge of Said Court:

John J. Devaney, Jr., Attorney for the Securities and Exchange Commission, appointed and directed by order of this court on October 10, 1957 to prosecute the defendant on behalf of this court, files this application for the institution of criminal contempt proceedings against the defendant and respectfully shows as follows:

1. On April 15, 1957, the Securities and Exchange Commission filed in this court a complaint entitled Securities and Exchange Commission, plaintiff v. Swan-Finch Oil Corporation, et al., defendants, under Civil Action File No. 110-232.

2. On May 18, 1957, a subpoena was personally served on the defendant at his home, Echo Falls Farm, Meeting House Road, New Hope, Pa., within 100 miles of this court as prescribed in Rule 45(e) of the Federal Rules of Civil Procedure ordering the defendant to appear and give testimony in Securities and Exchange Commission v. Swan-Finch Oil Corporation, et al., on June 10, 1957, as more fully appears in the affidavit of L. Bruce Hilsee attached hereto. A copy of the subpoena is attached hereto and marked Exhibit A.

3. On June 10, 1957, the Honorable Judge Sidney Sugarman, after noting the failure of the defendant to appear in response to the subpoena, ordered the subpoena to remain in full force and effect until October 7, 1957.

4. On October 4, 1957, a subpoena was personally served on the defendant at La Guardia Airport, New York, N. Y., within the jurisdiction of this Court, pursuant to Rule 45(e) of the Federal Rules of Civil Procedure, ordering the defendant to appear and give testimony in said action on October 7, 1957, as more fully appears from th affidavit of L. Bruce Hilsee attached hereto.

5. The defendant wilfully failed to appear and give testimony on October 7, 1957 in Securities and Exchange Commission v. Swan-Finch Oil Corporation, et al., in criminal contempt of this Court and of the lawful authority of the United States.

6. The attached affidavit, executed by John J. Devaney, Jr., on October 11, 1957, reviews the foregoing facts and additionally, sets forth the information submitted to the Honorable Sidney Sugarman at the time the Honorable

Appendix B.

Sidney Sugarman ordered the prosecution of this application and order to show cause for criminal contempt.

JOHN J. DEVANEY, JR.,
Acting pursuant to order of
Honorable Sidney Sugarman, Judge,
United States District Court.

SECURITIES AND EXCHANGE COMMISSION
by

THOMAS G. MEEKER,
General Counsel.

PAUL WINDELS, JR.,
Regional Administrator.

WILLIAM D. MORAN,
Assistant Regional Administrator.

EILEEN E. EVERS,
Attorney.

Post Office Address,
225 Broadway,
New York 7, New York.

Appendix B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AFFIDAVIT.

UNITED STATES OF AMERICA,

v.

LOWELL M. BIRRELL.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I, JOHN J. DEVANEY, JR., being duly suworn, state:

I am employed as attorney by the United States Securities and Exchange Commission and assigned to the New York Regional Office of the Commission located at 225 Broadway, New York, N. Y. I am Chief, Branch of Enforcement and am charged with the initial responsibility for all court actions instituted by the Commission pursuant to the statutes which it administers and which originate in the New York Regional Office;

On April 15, 1957 a complaint was filed in the United States District Court for the Southern District of New York and entitled *Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*, Civil Action No. 119-232. This complaint sought a preliminary and a final injunction against the defendarts named therein from further violating the registration provisions of the Securties Act of 1933, 15 U.S.C. 77e;

On April 15, 1957, contemporaneously with the filing of the foregoing complaint, an Order to Show Cause was

presented to the Honorable Judge Sidney Sugarman, United States District Court for the Southern District of New York for signature. This Order to Show Cause contained a temporary restraining order and set the matter down for hearing on the motion for a preliminary injunction;

After various postponements and the consent of several of the defendants to the final judgment, including Lowell M. Birrell, the Commission's motion for a preliminary injunction was waived and the Honorable Judge Sidney Sugarman, with the consent of the remaining defendants and plaintiffs herein, calendared the matter for a plenary trial on June 10, 1957;

After the setting down of the matter for the plenary trial and on or about May 17, 1957, I requested L. Bruce Hilsee, an employee of the New York Regional Office of the Securities and Exchange Commission to serve Lowell M. Birrell with a subpoena for his appearance at the commencement of the trial set for June 10, 1957. The facts regarding the service of this subpoena are set forth in the affidavit executed by Mr. Hilsee, which is attached hereto;

When Court opened on June 10, 1957 the Honorable Sidney Sugarman, Judge, announced that pre-trial conferences would be held and announced from the Bench that all the subpoenas for witnesses would remain in full force and effect until October 7, 1957, at which time the trial in this matter would commence;

In order to insure Mr. Birrell's appearance on October 7, 1957, efforts were renewed to serve upon him a subpoena within the jurisdiction of this Court. On October 4, 1957 I was advised that Mr. Lowell M. Birrell would be at La Guardia Airport. I directed Mr. Hilsee, who had previously served Mr. Birrell, to take a new subpoena and serve it upon Mr. Birrell. The circumstances of the serving of this subpoena are set forth in Mr. Hilsee's affidavit;

Appendix B.

When the Court convened in the *Matter of Securties and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*, at 10:30 A. M., October 7, 1957, Room 705, United States District Court for the Southern District of New York, the Court announced that a pre-trial conference would continue with respect to the remaining defendants. At this time I informed the Honorable Sidney Sugarman, Judge, that a new subpoena had been served upon Mr. Birrell calling for his appearance in Court Room 705 and requested the Court to ascertain if Mr. Birrell was present. In my presence the Honorable Sidney Sugarman, Judge, asked if Lowell M. Birrell was present in the Court Room. No response was made. The Court then directed his Clerk to telephone the office of Lowell M. Birrell at Doeskin Products, Inc. to ascertain his whereabouts. The Clerk reported back that he had attempted to reach Mr. Birrell but had been advised by the person answering the phone at Doeskin Products, Inc. that Mr. Birrell was out of the city. Pursuant to the instructions of the Honorable Sidney Sugarman, Judge, a letter was sent to Lowell M. Birrell and his counsel certified mail, return receipt requested, advising that the subpoena remained in full force and effect and that Lowell M. Birrell was to appear in Court Room 705 at 10:30 A. M. October 11, 1957;

On the afternoon of Monday, October 7, 1957, Mr. Richard Wels, who had previously appeared as counsel for Mr. Birrell, asked to see me in my office. During this conference I told Mr. Wels that a Court subpoena had been served upon Mr. Birrell for his appearance in Court that morning and that Mr. Birrell had not appeared;

I left my office early on Monday and remained away from it on October 8, 1957 due to illness. On my return to my desk on Wednesday, October 9, 1957, a letter addressed to me by Richard Wels, sent special delivery, was awaiting my attention. A copy of this letter is attached hereto as Exhibit 1. In this letter Mr. Wels stated that

Mr. Birrell was on a through flight from Montreal to Cuba and that the service of the Court subpoena was made upon him at a time when he was changing flights and that Mr. Birrell had proceeded after service of the subpoena to the Newark Airport and continued his flight to Cuba. Mr. Wels' letter further recites that Mr. Birrell has been confined to bed by his physician after his arrival in Havana and that Mr. Birrell is in a state of complete exhaustion;

To determine Mr. Birrell's flight plan I called the Eastern Air Lines' principal office in New York City. An official by the name of Pfister of Eastern Air Lines stated that he would make inquiry for me with respect to my questions, namely, what sort of ticket arrangement did Mr. Birrell have on his flight from Montreal to New York and then to Cuba, when were such tickets purchased, and what flights, if any, Mr. Birrell was on from Newark Airport to Cuba. Mr. Pfister advised me that Mr. Birrell had travelled from Montreal to New York and had used the return portion of a round trip, New York to Montreal and return, ticket purchased by Mr. Birrell on October 2, 1957 for his passage. Mr. Pfister stated he would obtain a photocopy of this ticket which was presently in their file in Miami, Florida, and would make it available to me. Mr. Pfister further stated that Eastern Air Lines did not fly directly to Cuba, but that he would have all passenger manifests of flights by Eastern Air Lines from Newark to Miami or other connecting points for Cuba checked to ascertain if Mr. Birrell was aboard any of these flights. Mr. Pfister reported to me that he was unable to find any record of a passenger by the name of Lowell M. Birrell on any flight by Eastern Air Lines from Newark to connecting points for Cuba. I then made inquires to ascertain whether any other air lines flew from the Newark Airport to Cuba and was advised that there are no such flights;

Appendix B.

At the resumption of the pre-trial conference on October 10, 1957 most of the information contained herein was furnished to the Honorable Sidney Sugarman, Judge, and the Honorable Sidney Sugarman directed counsel for the Securities and Exchange Commission to appear on behalf of the Court pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure for an order to show cause why Lowell M. Birrell should not be found guilty of criminal contempt.

This affidavit is submitted in support of the application for the Order to Show Cause and no previous application for the punishment sought herein has been made to this or any other Court.

JOHN J. DEVANEY, JR.

Sworn to before me this
11th day of October, 1957.

BARRY GREENWALD
Notary Public, State of New York
No. 60-6359500
Qualified in Westchester County
Term Expires March 30, 1958

Appendix B.

CIVIL SUBPOENA

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

To LOWELL M. BIRRELL
Meeting House Road
New Hope, Pa.

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of New York, at the courthouse, Foley Square in the City of New York, in said District, on the 10th day of June A. D. 1957, at 10:30 o'clock A. M. of said day (and bring with you

)

then and there to testify on behalf of the Securities and Exchange Commission in a suit pending in said Court wherein Securities and Exchange Commission is Plaintiff and Swan-Finch Oil Corporation et al. Defendants.

May 18, 1957.

HERBERT A. CHARLSON,
Clerk.

By HELEN W. COLP,
Deputy Clerk.

PAUL WINDELS, Jr.,
Attorney for Plaintiff,
Address 255 Broadway, New York 7, N. Y.

NOTE: Report at Court, Rooom No. 906.

Served on Lowell M. Birrell personally at Echo Fall Farm, New Hope, Pa. at about 4:25 P. M. May 18, 1957.

By L. BRUCE HILSEE

Appendix B.

CIVIL SUBPOENA

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

To LOWELL M. BIRRELL
Park Lane Hotel
New York, N. Y.

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of New York, at the courthouse, Foley Square in the City of New York, in said District, on the 7th day of October A. D. 1957, at 10:30 o'clock A. M. of said day (and bring with you

)

then and there to testify on behalf of the Securities and Exchange Commission in a suit pending in said Court wherein Securities and Exchange Commission is Plaintiff and Swan-Finch Oil Corporation et al. is Defendant.

October 4, 1957.

HERBERT A. CHARLSON,
Clerk.

By HELEN W. COLP,
Deputy Clerk.

PAUL WINDELS, Jr.,
Attorney for Securities and Exchange Commission,
Address 225 Broadway, New York 7, N. Y.

NOTE: **Report at Room 705.**

Served on Lowell M. Birrell personally at La Guardia Airport at about 4:50 P. M. October 4, 1957.

L. BRUCE HILSEE

Appendix B.

Law Offices
Moss & Wels
551 Fifth Avenue
New York 17

Frank Moss (1900-1920)
Isidor Wels
Richard H. Wels
Alan D. Marcus

October 8, 1957

John J. Devaney, Esq.
Securities and Exchange Commission
225 Broadway
New York, N. Y.

Re: Lowell M. Birrell

Dear Mr. Devaney:

With reference to our telephone conversation of yesterday, I have checked what you told me concerning the service of a subpoena on Mr. Birrell.

I am informed that he was *not* served with an administrative subpoena directing his appearance at the New York Regional Office of the Commission. He was, however, served with *two* copies of the subpoena directing his appearance in Federal Court in connection with the proceedings against Reldan.

If you will check with your process server, I am quite sure that you will find that the report which you received as to Mr. Birrell having been served with a subpoena for appearance at the Commission was incorrect.

As you know, Mr. Birrell was served with the subpoena for his appearance in Federal Court at the LaGuardia Airport, where he was making a change of planes while enroute from Montreal to Havana. After being served,

he went to the Newark Airport and boarded the plane for Havana for which he had been ticketed when he purchased his through ticket from Montreal to Havana.

I talked to Havana this morning and have ascertained that Mr. Birrell has been confined to bed by his physician since he arrived in Havana last week. He is in a state of complete exhaustion, and I seriously doubt that he will be permitted by his physician to come to New York for the purpose of appearing in court on Friday. I shall probably hear further with regard to this some time tomorrow, and when I do, I shall communicate with you promptly.

Sincerely yours,

R. H. Wels
RICHARD H. WELS

RHW/H—Spec. Del.

MOSS & WELS
551 Fifth Avenue
New York 17, N. Y.

(Stamps)
United States
20 Cents

SPECIAL DELIVERY

John J. Devaney, Esq.
Securities and Exchange Commission
225 Broadway
New York, N. Y.

(Cancellation Stamp)
[New York 17, N. Y.
Oct 9 2—PM 1957]

POSTAGE DUE —— CENTS

Appendix B.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

L. BRUCE HILSEE, being duly sworn, states:

That I am an employee of the United States Securities and Exchange Commission assigned to the New York Regional Office located at 225 Broadway, New York, N. Y. I am over 21 years of age, and I reside at Church and Accomac Roads, Wyncote, Pennsylvania;

On Friday, May 17, 1957, I was directed by my supervisor to attempt to serve a subpoena issued by the Clerk for the United States District Court for the Southern District of New York upon Lowell M. Birrell. I was assigned this task in view of the proximity of Lowell M. Birrell's home at Echo Falls Farm, Meeting House Road, New Hope, Pennsylvania to my home;

On Saturday, May 18, 1957, I proceeded to Echo Falls Farm where a horse show was in progress. I enlisted the aid of a member of the State Police for the Commonwealth of Pennsylvania who was acquainted with Mr. Birrell to point out to me Mr. Birrell. He did so, and I thereupon approached Mr. Birrell and tendered to him the subpoena calling for his appearance in the action entitled "*Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*" The date upon which Mr. Birrell was to appear was at 10 A. M. June 10, 1957;

On October 4, 1957 I was again instructed to serve a subpoena issued by the United States District Court for the Southern District of New York upon Mr. Lowell M. Birrell. I received this assignment because Mr. Birrell was known to me from my previous service. I was told Mr. Birrell would arrive at LaGuardia Airport, New York, N. Y., aboard an Eastern Air Line Flight No. 45

from Montreal, Quebec, Canada and this flight would land at approximately 4:38 P. M., October 4, 1957;

Accompanied by Cornelius P. Griffin and Irwin L. Germaise of the staff of the New York Regional Office of the Securities and Exchange Commission I proceeded to LaGuardia Airport and arrived at such airport at about 4:15 P. M., October 4, 1957. At my arrival at the airport I contacted an official of Eastern Air Lines and after exhibiting my credentials as an employee of the Securities and Exchange Commission, requested him to advise me whether Lowell M. Birrell was a passenger on Flight No. 45. This gentleman contacted the Montreal office of Eastern Air Lines and reported to me that Lowell M. Birrell was aboard Flight No. 45. Accompanied again by Messrs. Griffin and Germaise I proceeded to the gate where the plane was due to disembark its passengers and again after exhibiting my credentials to Mr. Linkletter of Eastern Air Lines, I explained that I was there for the purpose of serving a subpoena upon Lowell M. Birrell;

When the flight landed and the passengers were disembarking I stood approximately 50 feet on the landing field away from the gate through which the passengers were to pass. This was made possible by the cooperation of Eastern Air Lines and its representatives. My purpose in standing here was to recognize Mr. Birrell when he alighted from the plane;

I recognized Mr. Birrell, walked up to him addressed him as Mr. Birrell and tendered to him the subpoena calling for his appearance in the United States District Court for the Southern District of New York, at 10:30 A. M., October 7, 1957, a copy of which subpoena is attached hereto as Exhibit A, and I also served upon Mr. Birrell a subpoena issued by the Securities and Exchange

Commission calling for his appearance in a private investigation;

I served Mr. Birrell by placing the two subpoenas beneath his armpit as he held in one hand an attache case and in his other hand he was carrying a top coat. Mr. Birrell took the two subpoenas from his armpit, glanced at them and proceeded on his way without saying anything.

L. Bruce Hilsee.

Sworn to before me this
10th day of October, 1957.

Harry Greenwald,
Notary Public,
State of New York.
No. 80-6659500.
Qualified in Westchester County.
Term expires March 30, 1958.

Appendix B.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

WARRANT OF ARREST.

Cr. 154-351

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOWELL M. BIRRELL,

Defendant.

To: UNITED STATES MARSHAL, SOUTHERN DISTRICT OF NEW YORK, or any other United States Marshal or other authorized officer:

YOU ARE HEREBY COMMANDED to arrest Lowell M. Birrell and bring him forthwith before the District Court for the Southern District of New York in the City of New York, for the reason that he wilfully failed to appear after having been served with a subpoena to appear at the trial of the case of Securities and Exchange Commission v. Swan-Finch Oil Corporation, et al., on the 7th day of October, 1957, and thereafter having failed to respond personally to an Order to Show Cause, duly issued on the 11th day of October, 1957.

YOU ARE FURTHER COMMANDED to detain him in your custody until he is discharged by the Court.

Upon order of Honorable Sidney Sugarman, United States District Judge, this 20th day of November, 1957.

(Seal) HERBERT A. CHARLSON, Clerk

By JOHN D. LIVINGSTON,
Deputy Clerk

Warrant of Arrest ordered issued
November 20, 1957.

SIDNEY SUGARMAN,
U.S.D.J.

Appendix B.

November 22, 1957

John J. Devaney, Esq.
Securities and Exchange Commission
225 Broadway
New York, N. Y.

RE: LOWELL M. BIRRELL

Dear Mr. Devaney:

I am somewhat concerned by articles, relating to the contempt proceeding, which have appeared in the NEW YORK HERALD-TRIBUNE, THE NEW YORK WORLD-TELEGRAM, THE NEW YORK JOURNAL-AMERICAN and THE NEW YORK DAILY NEWS since we appeared before Judge Sugarman on November 20.

To the best of my knowledge, the only reporter who was in the courtroom was a representative of THE WALL STREET JOURNAL. The article which appeared in the WALL STREET JOURNAL is the only one of these news article which bears any resemblance to what actually occurred in the courtroom on November 20.

According to the transcript of the minutes of the hearing on Novembmer 20, all that you said in court was "Yes, your Honor, that will be done" and "That will be done, your Honor" and "Thank you, your Honor."

The articles appearing in the HERALD-TRIBUNE, JOURNAL-AMERICAN, WORLD-TELEGRAM and DAILY NEWS set forth many statements which it is said you made to Judge Sugarman on November 20 concerning Mr. Birrell, and on the basis of which Judge Sugarman took the action that he did. None of these statements, although fully reported in the press, appear in the transcript, and certainly none of them were heard by me in open court. One of these statements which relates to me is certainly completely incorrect.

From this I can only assume that Judge Sugarman's statement that "I have the notion that he (Mr. Birrell) is trifling with the Court" must necessarily have been based on ex parte statements made by you or by other representatives of the Commission to Judge Sugarman out of the courtroom.

I am writing this letter to inquire whether, in fact, you or any other representatives of the Commission discussed this matter with Judge Sugarman when I was not present. In the event that you did so, I feel I am entitled to know when and where such conversation occurred and what statements you made to the court, so that I may have an opportunity to refute them.

I should also like to know whether any reports, cables, letters, memoranda or other documents relating to Mr. Birrell, apart from those which you read in open court on November 1 and November 4, were shown by you to the court, and if they were, I request that copies of them be made available to me. This request is intended to include any cables, letters, reports, memoranda or other documents which may have originated with personnel of the Military and Naval Services, or with representatives of the Foreign Service, as well as similar documents originating with the Commission.

Sincerely yours,

RICHARD H. WELS

RHW/H
CC—Paul Windels, Jr. Esq.
Lowell M. Birrell

Appendix B.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK

FINAL JUDGMENT

Cr. 154-351

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL

This cause having come on to be heard before Judge Sidney Sugarman on December 2, 1957, upon the order to show cause and affidavit of Richard H. Wels annexed thereto and all the proceedings heretofore had herein it is hereby

ORDERED, ADJUDGED AND DECREED, that the application to vacate the order directing that a warrant issued for the arrest of the defendant, Lowell M. Birrell and to quash the said warrant issued on November 20, 1957 be and it is hereby denied.

Dated: New York, N. Y., December 2, 1957.

SIDNEY SUGARMAN,
United States District Judge.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 21 1958
JOHN T. FEY, Clerk

No. 430 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

IN THE MATTER OF THE PETITION OF
LOWELL M. BIRRELL

On Motion for Leave to File Petition For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable Sidney Sugarman, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of Said Court.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.
JOHN J. DEVANEY, JR.
(By appointment of Judge Sugarman),
225 Broadway
New York, N. Y.

THOMAS G. MEEKER,
General Counsel,
DAVID FERBER,
Assistant General Counsel,
Securities and Exchange Commission,
Washington 25, D. C.

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Lamb v. *Cramer*, 285 U.S. 217	7
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Perkins v. *Elg*, 307 U.S. 325	9
Schachtman v. *Dulles*, 225 F. 2d 938	9
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Statutes:

Securities Act of 1933, Section 5, 48 Stat. 71, as amended, 15 U.S.C. 77e	3
62 Stat. 929, as amended, 28 U.S.C. § 1291	8
18 U.S.C. § 401, 62 Stat. 701	2

Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 430 Misc.

IN THE MATTER OF THE PETITION OF
LOWELL M. BIRRELL

On Motion for Leave to File Petition For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable Sidney Sugarman, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of Said Court.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

There has been no reported opinion below. The oral remarks of the District Court in denying petitioner's motion to vacate the order that a warrant be issued and for the arrest of petitioner are set forth at Pet. 98-105.[1] There is apparently no transcript of the oral statement of the Court of Appeals for

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[1] "Pet. —" refers to the printed petition and to its appendix.

the Second Circuit (per Judge Medina) when that court denied relief similar to that which is here sought.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

STATUTE INVOLVED

18 U.S.C. 401, 62 Stat. 701, provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

QUESTION PRESENTED

Whether this Court should issue a writ of prohibition or mandamus to prevent continuance of a contempt proceeding based upon petitioner's failure to respond to subpoenas personally served upon him in a civil action subsequently terminated, where the contempt proceeding was specifically labeled a "criminal contempt" and was brought for the stated purpose of determining whether petitioner should "be adjudged in criminal contempt * * * and punished accordingly."

STATEMENT

The contempt proceeding in the United States District Court for the Southern District of New York, *United States of America* v. *Lowell M. Birrell*, Criminal Contempt No. CR 154-351, which is the subject of the extraordinary writ sought by petitioner, was instituted on October 11, 1957, by order to show cause why petitioner "should not be adjudged in criminal contempt * * * and punished accordingly," after petitioner had failed to respond to subpoenas personally served upon him in a pending civil action for injunction brought by the Securities and Exchange Commission.[2] (Pet. 109.) Judge Sugarman, who signed the order to show cause, had specifically stated that the proceeding was to be one for "criminal contempt under the last subdivision of Title 18, Section 401" and was to be "governed by Federal Rule of Criminal Procedure 42(b)" (Pet. 56), pursuant to which rule he had appointed an attorney of the Securities and Exchange Commission for the purpose of making the application (Pet. 59). In response to the suggestion that the proceeding be

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[2] *Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*, Civil Action No. 119-230. Prior to the service of the subpoenas, petitioner, who was one of the defendants in that action, had consented to the entry of a final decree of permanent injunction against further sale of the securities of Swan-Finch Oil Corporation in violation of the registration provisions of the Securities Act of 1933 (Section 5, 48 Stat. 74, as amended, 15 U.S.C. 77e). However, the action had not yet been concluded as to certain of the defendants, and petitioner's testimony as a witness was desired in connection with those pending proceedings.

instituted by an order of arrest, Judge Sugarman had stated that petitioner (Pet. 57):

> "should be given the opportunity of coming in and making himself right with the Court.
>
> "However, then, if he ignores that, as he has ignored the subpoena, then I believe the Court in order to preserve its own dignity and authority would have no recourse but to issue a warrant for his arrest."

On November 1, 1957, the return date of the order to show cause, petitioner was not present in person. His counsel, who had been subpoenaed to be present that day, announced that he had just spoken with petitioner, who was in Havana, and stated (Pet. 76):

> "Mr. Birrell has asked me to state to the Court that as soon as he is advised by his doctor in Havana, and the doctor feels that he can come back here to New York, that he will be here to testify in this contempt proceeding and in these other proceedings."

After several adjournments, on November 20, 1957, a warrant was issued for the arrest of petitioner, who had not yet appeared in person (Pet. 126). Two days earlier, the injunction action in which the subpoenas had issued had been concluded.

On December 2, 1957, the District Court denied an application to vacate the order directing issuance of the warrant and to quash the warrant (Pet. 129). Petitioner then applied to the Court of Appeals for the Second Circuit for a writ of prohibition and mandamus. On December 9, 1957, the Court of Appeals denied the petition (Pet. 23). An application

for stay of the contempt proceeding, and of the enforcement and execution of the warrant for arrest pending final determination by this Court with respect to the petition for a writ was denied in the District Court on December 26, 1957. A similar application made in this Court was denied by Mr. Justice Douglas on January 3, 1958.

ARGUMENT

The petition for a writ of prohibition and mandamus is wholly without merit since (1) the District Court has proceeded properly and within its jurisdiction and (2) petitioner will have ample opportunity to correct any errors through normal appellate review.

1. In essence, petitioner's claim is that the proceeding against him is for civil contempt and hence, unlike a proceeding for criminal contempt, abated when the lawsuit in which the contempt occurred terminated. There is, however, no factual support for this contention that the proceeding is one in civil contempt. The contempt proceeding was instituted, as indicated above (p. 3), in conformity to the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure (Pet. 56, 59, 109-113) so that the District Court might "preserve its own dignity and authority" (Pet. 57); it was distinct from the civil action in which the subpoena had issued; it was brought in the name of the United States and from the outset was specifically labeled a "criminal contempt" (Pet. 65, 91, 109, 111, 114, 126); and, finally, the relief sought was that petitioner "be adjudged

in criminal contempt * * * and punished accordingly" (Pet. 110).

This case is in no respect comparable to *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, relied upon by petitioner, where, as this Court noted (at 445), "the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original cause in equity." The opinion pointed out that the title of the action "is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority" (at 446). The quotation from the *Gompers* case at page 33 of the petition is inaccurate. It fails to indicate that the last sentence before the asterisks is incomplete. With emphasis added to indicate the material omitted by the petitioner, that sentence reads (221 U.S. at 451):

> "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—*of course without prejudice to the power and right of the court to punish for contempt by proper proceedings.*"

Petitioner also omits the next three sentences in the opinion, which emphasize the distinction between that case and this (*id.* at 451-452):

> "If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public

on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

"But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character."

Although he does not spell it out explicitly, petitioner appears to argue that the determination whether a contempt is civil or criminal is necessarily dependent upon the nature of the act and that disobedience to a subpœna, being a refusal to do an affirmative act, can constitute only civil contempt (Pet. 27, 38). That this is not the law was reiterated in *Yates* v. *United States*, 355 U.S. 66, where both the majority and dissenting opinions were predicated on the proposition that a refusal to testify could be the basis for either civil or criminal contempt. This is also in full accord with the *Gompers* case—which emphasized (221 U.S. at 448) that the relief sought is "controlling" and "determinative"—as well as with other cases relied upon by petitioner.[3] In-

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[3] See, *e.g.*, "it is the nature of the relief asked that is determinative of the proceeding." *Penfield* v. *Securities and Exchange Commission*, 330 U.S. 585, 590, citing *Lamb* v. *Cramer*, 285 U.S. 217, 220.

deed, this Court has held: "The same acts may justify a court in resorting to coercive and to punitive measures."[4] None of the cases cited by petitioner supports the proposition that a proceeding properly instituted as a criminal contempt must be treated as a civil contempt.

2. Should petitioner be held in criminal contempt, he will of course have a right to appellate review in the normal course,[5] and issuance of an extraordinary writ is unnecessary for his protection. He will be entitled to raise on appeal any issue which he preserves, including the present claim that the proceeding against him is not, and cannot be, a criminal contempt proceeding. As noted in *Ex parte Fahey*, 332 U.S. 258, 260, these writs, as "extraordinary remedies, * * * are reserved for really extraordinary causes" and are not to be utilized as "substitutes for appeals." The cases cited in the petition (Pet. 45-46) in which this Court has issued such writs do not include any involving contempt proceedings nor situations comparable to the situation here.

The possibility that petitioner's passport facilities might be withdrawn to aid in his arrest creates no exceptional circumstance justifying issuance of the writ. Petitioner's contention on this score (Pet. 46-47) involves an unwarranted assumption that public officials will fail to accord him proper process in a proceeding that might be brought in the future and

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[4] *United States* v. *United Mine Workers of America*, 330 U.S. 258, 299.

[5] 62 Stat. 929, as amended, 28 U.S.C. 1291.

ignores his right to obtain court review should that occur. Cf. *Perkins* v. *Elg*, 307 U.S. 325; *Dulles* v. *Nathan*, 225 F. 2d 29, 30 (C.A.D.C.); *Schachtman* v. *Dulles*, 225 F. 2d 938 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of prohibition and a writ of mandamus should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JOHN J. DEVANEY, JR.
(By appointment of Judge Sugarman).

THOMAS G. MEEKER,
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Securities and Exchange Commission.

JANUARY 1958.

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